VOLUME IX

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

No. 15242

United States
Court of Appeals
for the Ninth Circuit

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER, Trustee,

Appellees.

Transcript of Record

In 9 Volumes

Volume IX

(Pages 3615 to 3949)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

The Court: The jury is present in their proper places. You may proceed.

Mr. Strachan: One of the arguments that has been made before you is that Sunkist has a monopoly on by-products fruit. But I think the evidence clearly shows that that is not the case.

When you get into the jury room, you will have with you the exhibits, which includes these defendants' Exhibit CF. That shows the percentage of Sunkist tonnage of products Valencias to the total, and it shows that over the years there has been some variation, but roughly it has been at about 65 per cent, and only 65 per cent of the available tonnage. It was 65 per cent exactly in the year 1950-51. The total of the California and Arizona production was about 490,000 tons, and that which Sunkist controlled was 318,000. So that means that there was one hundred seventy some thousand tons of fruit that was available elsewhere.

Winckler-Smith had other sources of fruit. He said as to the period following the Chapter XI arrangement, that in each crop year from 1949 through 1951 Winckler & Smith secured more tonnage from other sources than they did from Sunkist. As he put it, they bought so little from Sunkist it was meaningless. The important supplier was the Independent Fruit Growers. That was Morgan Ward's group.

And he reported on the fruit outlook to his executive [4560] committee, that is, Winckler did, on June 30, 1949. You will have the minutes with you in the jury room as Exhibit CS:

"Up to this date we have established a limited credit with the American Can Company, a very satisfactory credit arrangement with the Independent Fruit Growers for fruit supply * * *

"We have succeeded in securing 1,000 tons of fruit at a price of $36 a ton from the Independent Fruit Growers to cover our sales, which price is 10 per cent below the current price requested by the Fruit Growers Exchange."

And in FG, another exhibit that you will have with you, it shows with respect to 1951, that Winckler & Smith were obtaining a substantial tonnage of Valencias elsewhere than from Sunkist. In fact, practically their entire source was the Independents, and it shows, moreover, that the price paid was not Sunkist's price, it was generally lower.

I call your attention particularly to this last column, which begins with June of 1951. That is in the Valencia season, and it shows the purchases which he made at $35, $32, $35, $32, $34, $32.50, $32.50, and so on.

In addition to that, there were other sources. Mutual Citrus Products Company was on the market, and it was able to buy. We have two exhibits which you will have with you in the jury room, BZ and CA, showing the tonnage that [4561] they bought, very substantial tonnage of Valencias. In 1950 they bought 2,753 tons of Valencias from sources other than Sunkist, and only 39 tons from Sunkist.

The following year, 1951, which is the year Mr. Dixon argues in which Winekler-Smith was put

out of business, it shows the Mutual Citrus was buying fruit, it bought 2,432 tons, and all of it was bought at less than $40 a ton.

We also had the testimony of Mr. Nels Warner of Golden Citrus: In normal years the fruit that is available to us is in excess of the capacity of the plant to process it. We have fruit to sell every year.

As to the year 1951, he said: I believe we sold about a thousand tons at between $30 and $35. It varies in price. Sometimes it is 30, other times it would be as high as 35, but it would average, I believe, around $33 or $34 per ton.

And Mr. McCracken of TreeSweet, the man who was charged to be a co-conspirator, one of the co-conspirators—or his company is charged to be a co-conspirator—he testified that he bought fruit, Valencias, in 1951 from sources other than Sunkist. His testimony was that he bought 1,114 tons, other than from Sunkist, and that the average price he paid his suppliers was $32.97 a ton.

Finally, Morgan Ward testified as to his prices. He said: In 1951 we tried to get the Sunkist price, but we couldn't get it on all of our fruit. We didn't even get it [4562] on 80 per cent of our fruit.

Now, the result of all those pieces of evidence, and they are not all that are in the record either, but those that I have mentioned is, I submit, to show that when they claim that there was a monopoly of the by-products fruit, or that the price was fixed as a monopoly price, it just is not substantiated by the evidence in this record.

Now, there were several matters that affected the success or lack of success of the Winckler-Smith operation far more than anything that was done out here in California.

The first of those was the economic impact of Florida in 1951 on the fruit juice market. Florida crops and prices, you will remember, were testified to as being the controlling, the dominating influence over the California market. You will recall there were various reasons for that.

One was that they had lower costs of production, lower land costs, less irrigation. Another factor is that by comparison with the California fruit juice crop, the Florida crop was huge. It is nine or ten times that of California.

And you also recall that the Florida juice can be sold in competition with the California juice right here in Los Angeles. There is a 75 cents freight differential a case, to get the Florida juice into the Los Angeles market, but in spite of that the Florida juice outsells California juice right here. [4563]

Another exhibit that I want you to consider here and in the jury room is Exhibit CH. It is a tabulation which shows the relationship between the United States' total production of orange juice and the California production of orange juice. This is what I think you will see when you look at this exhibit:

One of the things is this: There were two three-year cycles, and they coincided with the two three-year cycles through which the Winckler-Smith busi-

ness went. In the first year, 1946, California had 16 per cent of the total market; in the next year it had 11 per cent; and in the next year the year in which Winckler-Smith went into Chapter XI, they had only 5 per cent.

Now, there is a drastic reduction in the market in which the juice could sell. From 15, almost 17 per cent, down to 5 per cent.

Then in the first year, 1949, the first year after the Chapter XI proceedings, we started another similar cycle. Eleven and four-tenths per cent California, nine and seven-tenths, seven and [4564-5] one-tenth.

There again we had a shrinking market for the California product. That latter three-year period is shown on this graph you will find in Exhibit BU. This shows the Florida citrus co-operatives' average price f.o.b. Florida for the years 1949, 1950 and 1951. You remember Mr. Warner was the witness who testified to this. He was here for a co-operative convention of some kind.

Here is where the market stood in June, 1949, when Winckler-Smith resumed operations after the first reorganization. Florida was completely out of the market. So California dominated the market all through this year.

Then there began a slight decline, the price leveled off during the year 1950 for a time down to about August or September, had reached nearly $3.50 a case. That means Florida juice price would be considerably higher than that price, $4 a case, so during all that period the price of juice was one

at which a California packer could make a profit, $4 juice. This was the highest price ever reached.

Then we had a precipitous drop in September, 1950. We had a sharp drop. A slight recovery up until April, and then the market dropped. Here is where the market was in the summer of 1951 when Case-Swayne had a participating contract with the Independent Fruit Growers and when Mr. Winckler found that he was out of the market because the price was so low. [4566]

Now, Winckler recognized what was happening. You will find in Exhibit AP he writes—this is in June, 1949:

"We are familiar with the market conditions existing in your territory. That is alike due to the lower rates in Florida, but you will agree that this year"——

This is 1949——

"conditions are not normal because Florida is practically sold out and our prices are competitive."

That was in 1949, the year that Hodge said was the true Valencia year.

Also, Mr. Winckler recognized 1949 was an unusual year when he reported to his executive committee in June, 1949, that:

"This year due to favorable conditions existing in the canned citrus market created by a shortage existing in Florida, the importance of sweetened juices, namely, orange juice and blend juice, has increased considerably over the past. Our company has already secured orders amounting to $400,000. It is expected that business will increase, prices

will increase during August and September and culminate in October."

So there again is an indication that when he was successful in the year 1949, he was successful because of abnormal conditions, the abnormal price of Florida juice, which made it [4567] possible for him to compete in that first year.

And in August of 1950, the conditions still continued.

"Inadequate supplies of Florida juice assisted the California packers in readily selling their current pack of orange juice."

Now, in describing what was happening during this period, Marvin Walker—I said Warner, but it is Walker from Florida who testified:

"By September of 1949 our average price had gone over $4.50 per dozen. I think that is an all-time record high. I recall no higher price. Prices started to go down some time in the season of 1949-50, and they dropped greatly in the season 1950-51."

He said:

"We had two or three very profitable years. Prices were going up and we had a big increase in our crop production, an increase in our yield. We raised our product prices to levels which naturally reduced the quantities purchasers were willing to purchase, so inventories were building up, and our packers, with the approval of our bankers, decided to unload that juice, and unloaded the juice and unloaded it fast."

Here is that unloading which brought the price

from $4 down to $1.75, that would be $4.50 down to $2.20 in that [4568] short period, and that is the period when Mr. Winckler found himself in trouble and it was trouble that was caused, not by anything that these defendants did, but by economic factors that are beyond the control of these defendants and were beyond the capacity of the Winckler-Smith company to cope with.

Now, there was another such economic occurrence that also should be noticed. The development of frozen concentrate had a revolutionary effect on the entire citrus fruit industry. For the industry as a whole, its effect was favorable. It found a new outlet for orange products. For the canners that were able to can the frozen concentrate and had the capacity to do that, it was a bonanza, but for the canners of single-strength juice, the effects were highly unfavorable.

Mr. Finley testified in this connection that: "It is just since the days of frozen concentrate that there has been a home for all the fruit. That is what the frozen concentrate technique did for the citrus industry. It gave it a home for all the fruit and a profitable home for all the fruit where single-strength had not been able to accomplish that."

Now, I want to show you a bar chart which shows how from year to year the orange juice produced in the California area was utilized, and here again we have these two cycles. Here is the year 1946. In that year the highest quantity [4569] of single-strength juice was packed. That was the year,

you remember, when California had 17 per cent of the total output.

The following year it dropped from 12,500,000 to 7,750,000, and then in the next year, the year that Winckler-Smith resorted to Chapter XI, the product dropped down to $5,000,000, and that is what caused the first resort to bankruptcy.

Now, in that same year, with a little bit of frozen produced, 75 per cent of the total California juice was of the single-strength. 25 per cent was of the frozen.

Then let's see what happened in the next year. That year the total production of juice was the highest that had ever been seen at that time. It went up to fifteen million and some gallons of juice. There was a slight increase there, back to seven and a half million, nearly the level it had been here. But in that year the production of frozen concentrate represented over 50 per cent of the total utilization of California oranges.

Then next this, down goes the single strength until it is back down about the 5,000,000 gallon level. But here is what is happening to the frozen: 68 per cent or 13,960,000, almost 14,000,000 gallons is frozen, and in the following year it is a still greater quantity, nearly 17,000,000.

That, I think, graphically shows not only what was [4570] happening in the industry, the revolutionary effect of this frozen concentrate, to give a home to all the fruit, 22,000,000 more total, as compared with twelve, which was the highest before that, but it also gives clear indication of an

economic adjustment in the citrus industry which Mr. Winckler was not prepared to cope with.

Mr. Winckler recognized that. You will see it in a number of his anagrams. In 1950, long before his failure:

"Production of single-strength juice remains extremely small due to high fruit prices paid by the low temperature concentrators which puts the squeeze on the canners and makes production unprofitable."

Another one, June, 1950:

"Unfortunately, the crop is short this year. A great portion of the fruit available to processors is going to be used by the frozen concentrators, who can afford to pay more for fruit than canners. For this reason, our fruit supply will be short."

Again in the spring of 1951, February, 1951:

"There is a scarcity of fruit which processors in California never experienced before, due to the fact that the fresh fruit markets have taken practically all of the fruit at higher prices than the canners can afford to pay." [4571]

And then in July, 1951, this is just when his troubles were coming to a peak:

"California plans to pack very little single-strength Valencia juice this season and no inventories of grapefruit. Most of the Valencia crop is going to go into frozen concentrate rather than single-strength juice."

That is in 1951. Then again in September, 1951, you will see this anagram which is identified as EC, which puts the proposition very bluntly:

"We indicated repeatedly in our previous bul-

letins the shortage of California Valencias is increasing from week to week because of the fact that available fruit for processing is going into the more profitable frozen concentrate than into the unprofitable single-strength juice."

There is the fact that controlled Mr. Finley's judgment that he should not process any more single-strength juice than he had to, that everything possible should be put into frozen concentrate, and that the only reason for packing single-strength juice would be to take up whatever juice there was that could not be accommodated in the frozen, and also to make up enough inventory to keep a little California juice on the market under well-known trade names.

Now, Mr. Winckler didn't keep up with this drastic [4572] change in the industry in which he was competing. He says he spent about $100,000 equipping himself to go into the frozen concentrate business. He said that he did that in order that, "We shouldn't be left out completely from the frozen concentrate field."

But he also testified that he had not—he said by January 31, 1951, he had spent $97,800 on frozen concentrate facilities, but even then he had not equipped himself for frozen concentrate.

Then in September, 1951, he writes to a broker in Honolulu and he says that:

"We think you will agree with us that there are two ways of promoting sales, and this is particularly true in the frozen concentrate field. One way, and that has been used by Sunkist and Snow Crop.

is to intensively advertise their products. But Sunkist is selling their frozen concentrate at $2.11 a dozen. A portion of this price goes to stimulate customer acceptance through advertising sales. We are just starting out in the frozen concentrate field. It is our intention to put out good quality of merchandise equal in many respects to Sunkist, but it is to be sold at what is being termed a B brand price, which means it will be sold at a price."

There is a late start. In 1949 the handwriting was on [4573] the wall, the single-strength processor was going to be squeezed by the frozen concentrator, and Mr. Winckler for one reason or another, possibly financial inability, perhaps inexperience in business, had not equipped his plant to take advantage of the change which brought prosperity to the industry and left Mr. Winckler in a failing condition.

Now, one of the claims that is made here is that the Winckler-Smith company had good will, a repute in the trade that was damaged as a result of what they call was unlawful conduct. The fact is, I think the record will show that there was no good will. There was no willingness of customers to buy repeat business. You will remember that Mr. Lynch made a computation to determine whether there was any good will and the court asked him if he could ascertain from the books and records of the corporation alone, without investigation of the customers, whether there was good will and what that good will is.

He said, "Yes, your Honor, it is customary to

make a calculation based on the earnings history of the company."

He described to you the formula that is used by the United States Government for revenue tax purposes, used by the Supreme Court, written in the handbooks, for determining good will.

That is determined after you have arrived at the earnings and have found that those earnings reflect something over [4574] and above the earning capacity of a like investment in the business. That is good will.

Because there were no net earnings, the computation of good will under the formula showed that there was a negative good will. That is about what is shown by the other evidence in this case.

You will remember that Mr. Winckler testified that he packed a lot of navel orange juice and it was very badly received in many quarters. It was bitter. He testified that the brokers complained that they got stuck with the product. Some had Anagold that stood on their shelves for years. Some of them complained and wondered whether the Anagold product was a current product because it had rusted cans and swell cans.

He testified, too, that he, although he knew that the navel juice was inferior or second quality, would pack that on request under the Anagold name. [4575]

He said, "I prefer to pack under another label. Why would I prefer that unless I realized I would risk the name of the Anagold label if I packed mer-

chandise which is second grade or not up to standards?"

Well, he did pack it. He packed this second grade product, and it did hurt the Anagold name.

When you get into the jury room, you will have before you a series of letters written by his broker organization, and some of those have been read to you. I won't read them all, but I will just mention a few of these. You can read them when you get in there.

Exhibit Z, July of 1949, written by Kriekhaus:

"We received some samples of Anagold brand orange juice and cut the samples with several buyers that were somewhat interested. None of the buyers liked the quality of this orange juice for it has an aftertaste that is objectionable."

Another one:

"Smith Bros. & Burdick Company have had trouble with this juice from the day it arrived." Anagold blend juice. "They have sent the merchandise out and it has been returned so often that the cases are practically worn out and those cases that are not worn out, the cans have swelled and blown up all over the merchandise so that it is one grand mess. They advised us today that they were going to [4576] truck the whole mess down to the city dump and junk it"——

The Court: Are you reading these for the truth of the matters contained in those letters?

Mr. Strachan: I didn't intend to, Your Honor——

The Court: Then call the attention of the jury for what purpose they were offered.

Mr. Strachan: Yes. They were offered for various purposes, but they were received only for the purpose of impeaching Mr. Winckler.

The Court: All right.

Mr. Strachan: "To make a long story short"—this is again in '49, written by Bobzien Company. "To make a long story short, the three largest buyers here of orange juice, namely, Malone & Hyde, Liberty Cash Grocers, Inc., and Weona Food Stores, Inc., state that your Anagold brand was very materially damaged in this particular market and territory when you shipped to this market, around two or three years ago, some of your Anagold brand Citrus Cocktail.

"The buyer for Malone & Hyde stated that if he bought any California fancy orange juice, he could not use the same under the Anagold brand because of the sad experience they had with your Anagold brand Citrus Cocktail * * * he feels that a good part of the public would be reluctant to buy the Anagold brand of orange juice.

"If you have another label for your fancy sweetened [4577] orange juice, please include such label with your letter. If you are not in position to furnish some other label, we will be unable to make up even a half a pool car."

Then here is a complaint against another thing, the pricing practices. Young Company of Salt Lake complained twice. Their first letter said:

"Frankly, we are at a loss to understand your method of operation * * *

"We have just rechecked wires received on quotations and to us they appear to be erratic, always higher than our competition. For instance, on August 5th you wired that your official opening price on Anagold Valencia fancy grade orange juice would be $4.35, while Exchange offered and sold it at $4.20. It is just impossible for us to follow your sales policy thus far. Our jobbers wonder if we really are in the business * * *"

And they make the same complaint again:

"We have been interested in the bulletins you have been sending us together with the different price changes, up and down, as they have fluctuated each week. This procedure has so unsettled our buyers that they don't know whether we have a price, or not. In fact, I have had two of them ask me if Winckler & Smith knew what they were doing."

Then here is one written to Charley Sisk, one-time sales manager, by Graves-Chambers of Seattle, Washington: [4578]

"Charley, while I was at National, Pat brought your old friend, George Paquette, in on the tasting and they used a sample of their own Happy Home to compare with. Both of them stood there and swore up and down that your acid content was too high for them.

"Pat said, 'I want to do business with Charley Sisk but, in this particular case, I cannot because of the difference in the quality and the fact that his product does not come up to our standard.'"

And another one in 1950, the summer of 1950, from Dickensheets-Potter Company, Portland, Oregon. It says:

"The product appears to be lighter in color and somewhat watery, with a considerable taste of peel in it. We thought it best to pass this information on to you, as it might be advisable for you to check carefully on your plant operations."

The same brokerage firm writes again:

"General Grocery Company are not very happy over the quality of the orange juice that they just received packed under their Preferred Stock label. I just sampled a can that they had opened out of the delivery, and had to confess it was not as good as the samples we received last week."

And then in October, a broker in Cleveland writes:

"Dear Friend Winckler: We have just checked back [4579] with Haserot Company of Cleveland, Ohio, in regards to the samples of juice forwarded to them, and just this morning they cut the grapefruit juice out of the sample they received and compared it with two others. One outside the state, and one which was from California. Their report was, of five samples, Anagold brand checked fifth, and when I heard the story I didn't believe it, but all five cans were still present, and we again checked the different cans, and, believe it or not, in my opinion, was by far last. There was a decided tin taste and seemingly a little oil taste, but the oil was not quite as noticeable as the very decided tin taste, and, of course, that was objection-

able to the buyer who was interested in his own label." [4580]

Now, there was one more test for the existence of good will, and that is whether the company enjoys a good repeat business.

We investigated that in connection with the Winckler-Smith claim that they had good will. Mr. Bylin testified what he had done. He made a list from the records of the Winckler-Smith Company of the customers who purchased Valencia juice in the 1949 season, and a list of the customers who purchased those same products in 1950, and compared the two lists to determine how many customers of 1949 continued to be customers in 1950. He found that a total of 708 customers had bought Valencia juice in the year 1949, and, of course, only 93 had returned as customers in the year 1950.

So that the repeating customers represented only 13 per cent of the 1949 customers.

Now, I say, ladies and gentlemen, in view of all that, it is impossible, I think, to conclude that there was any good will. And over and beyond that, there is a very clear indication that from 1949 to 1950 the chain reaction of causation, as Mr. Dixon has said, had set in. Winckler & Smith for the second time were grinding down to a business failure.

The difference between 1949 and 1950 is far more striking than the difference between 1950 and 1951. [4581]

I mentioned that bad financial practices had also played a part in the failures. It was the lack of a sound financial structure which led up to the fail-

ure in 1948, and to the later failure in '51. From the start to the finish Winckler & Smith operated primarily on borrowed money, rather than capital furnished by the owners.

You will have in the jury room, ladies and gentlemen, the balance sheets, and I hope you will look at them.

I want to call your attention to this: On the balance sheet of January 31, 1946, which is the balance sheet that was set up at the time the partnership operation was turned over to the corporation, down here in the corner of the exhibit, which is called A-1, you will see the original investment of the three partners; Goodland, Smith and Winckler. Goodland, $12,000; Smith, $40,000; Winckler, $10,000; total, $62,000.

For that $10,000 contribution to capital, plus $21,000 of undistributed earnings which remained in the partnership at the time the corporation took over, Hodge testified that Winckler secured $135,000 in face value of stock, and that $135,000 of stock gave him a 50 per cent control of the corporation. And the books show that that $10,000 was the only contribution that Mr. Winckler ever made to this business.

Now, let's look at the financial condition at the time [4582] the corporation took over. Cash on hand was only $100, the current assets were only $48,000, and the current liabilities were $77,000. Nearly $30,000 in excess of the current assets.

Here is the balance sheet at the end of that year,

there the current assets are $267,000, current liabilities $325,000. About $60,000 short.

Exhibit A-4 is the next balance sheet, and it shows an even worse condition. This is on the eve of the Chapter XI reorganization. Cash on hand, $59.85; current assets, $137,000; current liabilities, $336,000. Nearly $200,000 deficient, and a bank overdraft of $2,796.69.

Here is another exhibit which I want to commend to your attention, and that is BB. It is a comparison of the current assets and the current liabilities of the company for the two three-year periods in which it engaged in operations. Here is the first: The current assets are deficient by $29,000, in this year $57,000, and then $198,000 in this year, and there is the chapter XI reorganization (indicating). When they came out the situation was not much different. They had only $64,000 of current assets in excess of their liabilities, a very dangerous position in 1950. By January of 1951 they had only $16,000. And by July 31st of 1951 they were in the red, so far as current assets and current liabilities were concerned, by $120,000. [4583]

Now, the Chapter XI bankruptcy proceedings did nothing whatever to improve the financial basis on which this business rested. In fact, the financial condition was worse than it was at any other time.

No owners' capital was created——

The Court: You mean Chapter X?

Mr. Strachan: Chapter XI. The first one was Chapter XI, wasn't it?

The Court: The first one was X.

Mr. Fisher: The first was XI.

The Court: Then I am in error.

Mr. Strachan: No owner's capital was created in the course of that proceeding.

What happened was this: They entered into a sale of the property to Rubin and Parvin for $50,000. Leased the plant back again with an option to repurchase.

This arrangement was one of the major contributing causes to the later Chapter X proceeding. And I will tell you why that was.

This sale was not a sale, it was really a loaning transaction, whereby Rubin and Parvin advanced to Winckler the $50,000 and were to get it back later on.

Winckler described it in this fashion: It was just like putting in the pawn shop a diamond ring for $100, which was worth a thousand dollars, and as long as you get the diamond [4584] ring back for the thousand, plus interest, we are not interested in the price.

But when the company came out of the transaction, after having put its plant in pawn, it was in very much worse condition than it had ever been before.

Mr. Winckler reported to his executive committee that he had trouble getting credit, that the banks complained that they couldn't extend credit because the property, the ownership of the property, had left the corporation, and explained that in the first instance they had owned the property, and, therefore, had a basis of credit, but with the

property transferred to the stockholders under this arrangement, it no longer had a sound basis for credit. And that was one of the things that brought on this failure.

Our company, he reported, is in very definite and urgent need of credit requirements. We have not succeeded in establishing the necessary bank credits. Our negotiations with the bank have not been concluded satisfactorily, because the bank is objecting to the fact that the ownership of the property is divorced from the corporation.

They not only stripped the corporation of its principal asset, and left it with practically nothing to work on, but the deal worked out was one that was costly in the extreme.

Under the least arrangement for which Rubin advanced the $50,000, the company agreed to pay $1,500 a month in [4585] rent, but in addition to that, the company was obliged not only to pay the rent, but to pay the taxes, the insurance, the maintenance, the repairs, the principal and interest on the RFC loan, so that it had not only all of the obligations that it previously had, but in addition it had incurred an obligation of $1,500 a month.

They went to Hanson and tried to borrow money from him, and he said from an examination of the financial condition of the Winckler & Smith affairs I concluded that the bank could not providently loan Winckler & Smith except on a secured and guaranteed basis.

That this transaction was extremely costly and was responsible for a part of the financial diffi-

culties that he was in, Mr. Winckler testified that "we found it didn't work out too well. It was too expensive for us."

Now, the lease remained in effect from March of 1949 until April of 1950, so that the rent that was Parvin and Rubinfi further depleted the assets of 500. The repurchase, further, of the property from Parvin and Rubin, further depleted the assets of the company and depleted them at a time when the financial condition was desperate. [4586]

You recall Mr. Brown testified that as early as January, 1951, Winckler had said he was short of money. In addition to that, you will recall that Mr. Walker was on the stand and he testified as to the condition of the RFC mortgage. His testimony on that was that the mortgage went into default on February 5, 1951.

Now, with that RFC mortgage in default and with Winckler & Smith short of money, Rubin and Parvin decided it was time to sell the plant back. So they took the plant back and they took it back on payment of $17,325, so that, together with the rent that they had received, gave them back their $50,000 and more, and in addition to that they took one hundred thirty some thousand dollars of preferred stock to make up a total purchase price of $150,000. Now, here is where the transaction took place.

Exhibit BC is a comparison of total assets and the total liabilities by months from 1949 through 1951, down to 1952, and here in April is the time when the company has gone in the red and when

its mortgage to the RFC is two or three months in default, and they pay out $17,500 in cash. That is what finally strapped the company. Winckler allowed Rubin and Parvin to siphon off that much cash when the company was in desperate financial condition.

Now, the income account for the first six months shows this, that in the six-month period from January down to [4587] July, the company had lost in current assets position $133,000. They had sustained a total loss for that period of $148,000, all of which occurred before the Valencia season started, and the company at the beginning of that Valencia season had on hand only $5,000 in cash, had current assets of $100,000, but offsetting those were $220,000 of liabilities. The company was hopelessly insolvent. It was broke and, as Hodge testified, at that time it was in extremely poor financial condition. It was in no condition to weather the competition that was to come from the Florida packers dumping their crops in the summer of 1951.

Is that a convenient place to stop, your Honor?

The Court: Yes, it is convenient.

I will excuse you until 1:30. Do you all understand? 1:30 this afternoon. Remember the admonition of the court. The case is not yet submitted to you.

(The following proceedings were had outside the presence and hearing of the jury.)

The Court: The record will show the jury absent.

What is your estimate, Mr. Strachan, as to how much more time you want?

Mr. Strachan: Well, I think about not over 40 minutes.

The Court: Mr. Dixon, how much time are you going to want in rebuttal? Don't ask for too much.

Mr. Dixon: Well, your Honor, I certainly think I should [4588] be able to do it in a half hour or less. I will endeavor to confine it to that. I am certain it will not be any more than that. If your Honor will give me, or I can ask counsel to give me some warning after 20 minutes has passed, I think I can complete it within that period of time.

The Court: You have more time available, Mr. Strachan, if you want to use it. I am not trying to cut you off. I just want your estimate because this is outside of bounds already. Mr. Dixon has had three hours.

Mr. Strachan: I planned for two and a half hours and I think I will come very close to that.

The Court: I think you should limit any rebuttal to 30 minutes at the outside.

Come back at 1:30.

(Whereupon, an adjournment was taken until 1:30 o'clock p.m. of the same day.) [4589]

February 8, 1956—1:30 P.M.

The Court: The record will show the jury present.

Mr. Strachan, you may proceed.

Mr. Strachan: Yesterday in the course of his

remarks Mr. Dixon adverted several times to free American enterprise and to the necessity of protecting risk capital.

So far as risk capital is concerned, there is none involved in this case.

You will recall that the investment initially made by Mr. Winckler was an investment of $10,000, and his other partners made other capital contributions. At the time of the Chapter XI arrangement the claims of the unsecured creditors were paid off at 11 cents on the dollar, but that didn't apply to the owners of the business.

One of the first things that was done following that reorganization was that Mr. Winckler used about $10,000 of the $50,000 that Rubin and Parvin had provided to acquire the stock of Smith and Goodland, so the other two original partners were out, and Winckler had their stock, and he bought it with corporate funds.

Now, part of that $38,000 of forgiveness of indebtedness was represented by that $10,000. The balance of it represented other items. A bonus that had been paid Mr. Winckler before it was earned, and it subsequently developed that it [4590] never was earned.

So with the forgiveness of that indebtedness, Mr. Winckler not only withdrew his $10,000, the equivalent of his $10,000 in initial capital, but he got his capital back four times over.

The same can be said as to Rubin and Parvin. They never put a thing in this corporation. They put up $50,000 temporarily. They got $37,500 in

rent, they got another $17,325 in bonus, and they also got the balance up to $150,000 in preferred stock, but never did they put a cent into the business. The business was being run on the creditors' money. The creditors lost in both reorganizations.

Now, I want to talk about the arrangement that Case-Swayne worked out with Morgan Ward.

You will recall that Case-Swayne was consulted by Finley when he was trying to find capacity for processing the enormous crops that he expected when he was working in the spring of 1951, and Case-Swayne decided they were not interested in the deal. But later they made a deal with Morgan Ward, and under that deal they had a participation arrangement, the fruit was furnished, they processed it under their own label, sold it and accounted for the sale price, and were allowed over and above their manufacturing costs 5 per cent on the selling price. [4591]

Now, Case-Swayne had a price policy and Swayne testified to it before you ladies and gentlemen of the jury. He said that, "Generally Case-Swayne's prices are lower than TreeSweet and Sunkist. It is our intention, if possible, to maintain a differential in the neighborhood of 15 cents a case of 12/46's."

Now, that is the policy of the company with which Morgan Ward contracted.

The contract was entered into early in the summer, perhaps May or June, and it continued in effect throughout the Valencia season down to perhaps October of 1951. It was in effect when the

Florida canners started unloading their juice and unloading it fast.

You will find among the exhibits Exhibit AB, which is this curiously printed communication from Dickensheets & Potter, Portland, Oregon, to Winckler & Smith:

"Too late to dictate, but I ran across some real competition when I started working juice. Case-Swayne are booking orange juice here at $2.60 a case for the balance of the season with full protection against decline."

How did that come about? It came about because——

The Court: Mr. Strachan, I hate to interrupt and I try not to, but that again is one of the letters which was offered, not for the truth of the facts contained therein. That [4592] is the danger of that kind of evidence. Now you proceed to argue it as if those were facts. I have told the jury, and you heard me inform them and inform you, this letter has a place in this case, it was admitted in evidence for a limited purpose, but it can't be argued fairly as if it was any proof of the facts contained therein.

Mr. Strachan: Well, it is proof of this, I take it, your Honor. Mr. Winckler's statement was——

The Court: Just a minute. You are a good lawyer. You know what it is admitted for, for the purpose of impeaching Mr. Winckler, and you can argue it for that purpose. That isn't the way you were arguing it.

Mr. Strachan: You will recall——

The Court: If you were going to prove those facts a witness should have been called to prove those alleged facts.

Mr. Strachan: Mr. Swayne was called.

The Court: You can argue Mr. Swayne's testimony.

Mr. Strachan: And Mr. Swayne testified what he did during the summer of 1951 was to cut prices in order to meet the Florida competition, and he testified what his prices were. June 9 they were $2.92. June 23, $2.71. July 7, $2.68. July 21, $2.62. August 4, $2.22. August 19, $2.14. September 1, $2.16.

He was asked why he brought his prices down in that precipitous way. He said, "It was necessary for ourselves, [4593] as well as any other packer if they wanted to sell merchandise, to compete with the Florida market wherever it was."

Now, it was on August 3 that the first prices were quoted by TreeSweet and Sunkist on the new crop of Valencia oranges, and those prices were $2.20. The reason for those prices has been testified to before you, and that is that the price of Florida juice at that time had dropped to $1.75 or even lower, and it was necessary to quote the $2.20 price in order to meet Florida competition.

During that period Mr. Winckler had for a period of several weeks been discussing with Morgan Ward the possibility of getting a contract of the Case-Swayne type. Mr. Ward testified that he received a letter dated August 17 from Winckler-Smith, that prior to that letter there had been a

lot of discussions with Mr. Winckler with respect to his desire to obtain a contract similar to the Case-Swayne contract. The discussions covered a period from whenever the Case-Swayne deal was made until the letter was written, perhaps six or eight weeks, and here is the letter which was the follow up on these discussions:

"We discussed with Mr. Borden, the chairman of your by-products committee"——

this is by Winckler-Smith——

"the uncomfortable situation that we have to face with regard to the supply of Valencia oranges. Our [4594] discussion was centered around the possibility that we buy from growers fruit which we would put through various packing houses owned and operated by the independents in order to secure by-product fruit at a price comparable to our competitor.

"The contract of the Case-Swayne Corporation negotiated a few weeks ago was discussed, and we made the statement that due to this contract the pace was set for the canned juice prices for the coming season. These prices were entirely out of line with the fruit prices requested by the packers which has made it impossible for us to pack canned citrus juice up to this writing.

"We pointed to the fact that it would have been more advantageous from the angle of the independents to offer the same deal to us which was offered to Case-Swayne, and by doing so to create in the interest of the independents a competitive situation, rather than a monopolistic situation. Such

competitive situation would probably have resulted in better returns all along the line.

"Moreover, when we consider that during the past two years we have purchased close to a million dollars worth of fruit from the independents, we feel that a great injury was done to us of entering [4595] into such a contract without even having had a chance to be consulted or without any part in such surplus fruit being offered us.

"We suggest that from here on we should be supplied for the purpose of single-strength juice canning with an equal amount of fruit received in the past by Case-Swayne at terms and conditions similar to such a contract." [4596]

There is no question, ladies and gentlemen, that that act on the part of the Independent Fruit Growers, in refusing to deal with Winckler & Smith on the same terms as they dealt with Case-Swayne, had a serious and prejudicial effect on the business of Winckler-Smith. Because Winckler-Smith for a long time had been dependent not on Sunkist but on Morgan Ward for the tonnage of fruit that he was processing into single-strength juice.

You will find Exhibit BQ, which is a tabulation of the purchases of raw fruit of Winckler-Smith, according to sources of supply, and as Mr. Winckler testified, the amount that was bought over these last three years from Sunkist was so small it was laughable.

The first year after the Chapter XI reorganization, 17 per cent, or 2,025 tons was purchased. That was in the year 1950—that was the fruit season of

1949. In the next season only 127 tons of Valencias, less than 2 per cent of the total used. The balance of the fruit was bought either from Morgan Ward or other sources.

In the first year 73 per cent of the tonnage was bought from Morgan Ward, 9 per cent from others.

In the season of 1950, 91 per cent from Morgan Ward, 7 per cent from others.

And in the last year Morgan Ward's percentage dropped down to 86 per cent, and 13 per cent was purchased from other [4597] sources.

Mr. O'Hanlon testified to what was going on during the summer of 1951 while he was acting as sales manager for Winckler-Smith. He said:

"Q. Did you ever discuss whether Case-Swayne was obtaining oranges from Morgan Ward at a time when Winckler-Smith was not getting oranges?

"A. I know at times, because of the fact that fruit seemed difficult to get, Mr. Winckler mentioned that he was trying to get fruit from various sources, including Morgan Ward. My understanding of the situation at the time Mr. Winckler and I were discussing this shortage of fruit, primarily Mr. Winckler's intentions were to go into frozen concentrate, he seemed to be having difficulty getting fruit for some reason or other. His source of supply that he had been receiving fruit from previously was not supplying him with fruit."

That was one of the very important causes of the failure of Winckler-Smith, coming as it did when the company was financially incapacitated.

Now, I want to review briefly Mr. Finley's testimony as to why, when he was making plans to handle a bumper crop, it didn't occur to him to include Winckler-Smith in nis plans.

Of course he starts off with the proposition that they [4598] hadn't done any business with Winckler-Smith since 1947. Winckler-Smith was not a customer of Sunkist, had not done business with Orange Products Company. But he told you what the experiences had been prior to that time.

You will recall he told you about the time in 1947 when Mr. Winckler was badly in need of cartons, and he called on Finley to buy some cartons, and Finley said no. Cartons were hard to get, they were in short supply. Then Winckler said, "Then lend me some. I have a shipment coming in next Wednesday, and I will return them."

So on that understanding Finley shipped the cartons.

They hadn't been returned by the end of the week. He checked with Winckler. Winckler told him the cartons he expected still hadn't come in. He checked in another week and another week, and the same thing happened, and he never did get those cartons back. And in 1948 he still hadn't gotten the cartons back, so he had to file a claim in the Chapter XI proceedings, and he got 11 cents on the dollar, or $11 for some $300 worth of cartons.

That wouldn't, I think, leave a very good taste in anyone's mouth.

Then there were two other transactions in 1947. Both of them involved a custom packing deal for

hot concentrate. One of those occurred, I think, in May of 1947, and as the hot concentrate was delivered by Winckler & Smith to Orange [4599] Products it was found to have black specks in it, and the black specks were of such a character that they indicated inadequate preparation of the fruit for processing. They had lumps of dirt or smudge that had not been washed from the fruit before it was processed in the Citromats. The product had to be diluted, reprocessed and reconcentrated to make it satisfactory.

In addition, there were yeasts and active bacteria in this pasteurized product, and that spoiled something.

In order to prevent further occurrence of that, the plant sanitarian was sent by Mr. Finley, in order to try to improve the quality of the product sent out of the Winckler-Smith plant.

They tried another deal in August. Again they had no success.

They started off with a fairly acceptable product, but before long the product was worse than it had been the first time, had active yeasts and other bacteria, with the result that part of that, several barrels of it, had to be thrown down the sewer.

Mr. Winckler knew that this wasn't satisfactory.

He testified before you that he did deliver this spotted and unsatisfactory concentrate. So he knew what the fact was.

Mr. Dixon asked Mr. Finley whether they asked Winckler [4600] to pay or make good for any of this product that they dumped. And he said no, by

the time we discovered it they were in bankruptcy.

Then Finley testified that he knew of Winckler-Smith's financial condition because that was a matter of common knowledge. [4601]

Mr. Dixon mentioned yesterday that Harts at the time Mr. Finley contacted them in 1951 for the processing of frozen concentrate was having financial difficulties. That, however, has no bearing on the question which is at issue in this case. The issue in this case is whether it was unreasonable and unlawful to refuse to deal with Mr. Winckler on the TreeSweet basis. The deal with the Harts people was quite a different deal. It was simply a processing deal, what Mr. Armstrong called hiring of a plant to make your product for you.

You don't rely on the solvency of that kind of a processor if he simply takes your fruit and processes it and returns it. But that is not what the TreeSweet arrangement was.

The TreeSweet arrangement was a long-term arrangement. TreeSweet had committed itself to buy within a period of a year 275,000 cases of single-strength juice. Now, it does make a difference whether you are dealing with a solvent or an insolvent concern when you are making a contract and relying on a contract that they will be able to pay you within a year from now for 275,000 cases of juice.

So the financial condition of Winckler-Smith in the summer and spring of 1951 was a relevant and an important consideration which Finley rightly relied on.

Then as to the quality of the product. We [4602] had a considerable amount of testimony on that. Finley testified what the Citromat process was, how it resulted in the crushing of the peel and injecting of the peel juices and the taste of peel and rind into the juice, and he said the Citromat never could and never had been able to make a juice of the standard of quality that Sunkist insisted on. He said, "It would not make a satisfactory juice. I am satisfied of that in my mind."

We had another witness who testified to the same effect, Mr. Rodgers. He had worked in the Winckler-Smith plant. He had worked in a number of citrus plants, and he testified there never was a plant except Winckler-Smith that tried to make single-strength juice on Citromat machines. You either couldn't get the yield and quantity, or if you got the yield and quantity of the juice, you got peel.

So the quality of the juice which Winckler & Smith would have produced was a quality which Finley did not find acceptable. It was not the same quality of juice.

Now, the reason for the TreeSweet deal we can cover very briefly, and the policy behind it and the basic reasons for having the participation arrangements I have already covered.

But now why was TreeSweet the one that had the original participation agreement, and why was it the one that was continued year after year? [4603]

After the first year, it was apparent to Finley that TreeSweet and Sunkist organizations could get along satisfactorily. They were both high quality

producers. They both marketed on a high level basis. So by the time 1951 came along, there was a long-continued satisfactory relationship.

Another element was quality of product, which I have already mentioned, and the Citromat problem.

Another was that by the very nature of things the TreeSweet operation fitted in to what Sunkist wanted, that is, a packer who packed against inventory and kept the goods on the shelves on a 12-month basis.

Another was that they had a fine trade name. It was the best trade name in the business. In fact, Mr. Winckler said TreeSweet had the best distribution system. In the Los Angeles market, it was higher by far than any other canner. TreeSweet had a market for 20 per cent of the citrus juices. Sunkist had only 6 per cent, Anagold, only 4½, and they mentioned others which made up the balance.

But the ability of the sales organization to distribute high quality merchandise on a national basis was a quality that Finley was looking for when he dealt with TreeSweet, and it is one he got only with TreeSweet and certainly could not have had with Winckler & Smith. The label alone was worth much to Sunkist and Finley. [4604]

All in all, Finley figured that TreeSweet had a capacity to distribute 600,000 cases a year of single-strength juice. That was 200,000 more than Sunkist was able to produce.

I want to say one thing more about these arrangements. They were not arrangements that were made to suppress trade or to act as a restraint on trade

or to fix prices. Nobody was committed under these contracts to sell at any particular price. The sole commitment on the part of TreeSweet, for example, was that when they took the goods down for the purpose of sale and made a sale, they had to pay Sunkist. That is the only obligation they had. If they wanted to cut prices, they could. If they wanted to put their prices above Sunkist, they could.

But when you look at it realistically, neither TreeSweet nor Sunkist, nor the combination of TreeSweet and Sunkist and Silzle had a monopoly of juice sales or could have a monopoly. That is by reason of the fact that Florida controlled the juice market, and not any of these California packers.

So I say to you that by entering into this deal with TreeSweet, the growers were not only served by having made available to them a fine sales organization known to produce a fine quality, but they also, Sunkist, had put into the field a competitor, a competitor to compete with themselves, and the whole effect of that deal was neither to fix [4605] prices nor to monopolize but, on the contrary, was to stimulate competition, just as Mr. Winckler's letter to Morgan said, "If you give us a contract as well as Case-Swayne, it will have a tendency toward improving competition rather than fostering monopoly."

That is precisely what Finley was doing.

Now, we get down to the final phase of the evidence here, and that is what happened as between Finley and Winckler in 1951, the summer of 1951.

Finley had correctly interpreted the Florida conditions with regard to inventory and markets. The

fact was that Florida had packed an unusually large amount of single-strength juice and had underpacked on frozen concentrate. So that was why Finley made his plans and correctly planned, as far as the California growers were concerned, to minimize the production of single-strength and to pack as much frozen concentrate as the facilities available to him would pack, and acting on that theory, he signed up all the frozen concentrate processors that he could find that he thought were reliable and could produce the quality of product that he wanted, and when he had done that, there was still some juice, some by-product fruit to produce juice in excess of the frozen capacity, but it didn't amount to very much.

You will remember that when Finley got through making the arrangements for handling the bumper crop that he expected, [4606] he had made arrangements for some 18,000 tons of capacity per week, and that left in the industry something like 14,000 tons of capacity available to other owners and other growers and other processors. He had something like 55 or 56 per cent of the capacity arranged for. That, I might mention in passing, is less than the 65 per cent of the products fruit that Sunkist controlled.

There was a bumper crop in 1951, but it was not as large as he had calculated on. There had been over-estimates of the crop by the Government. So that actually the receipts of fruit were falling short during the whole season of what had been planned for.

You will find this chart, a graphic chart, FD,

among the exhibits. This black line shows, as Mr. Dixon said yesterday, the receipts of fruit, and it shows, I will agree, that it was higher than in any prior season. [4607]

I called your attention to the fact this morning that the other chart showed that with the advent of frozen concentrate the total demand for fruit had risen extremely high. There was a home for all the fruit, as they say in the trade.

So Mr. Finley had capacity enough to handle 18 or 19 thousand tons a week, and that is up here clear off the chart (indicating). Here is the 15,000 line. And this chart shows very graphically that never did the receipts approach the capacity which Finley had. It got up here around the 14,000 ton level in late July and early August. And then instead of staying up at that level, or going higher to the 16 or 18 thousand, it dropped very, very sharply.

Mr. Finley said that the first time Mr. Winckler talked to him it was just before July 16th when that letter, which Mr. Dixon read, was written, he told Winckler that he didn't sell fruit, if he wanted to buy fruit he should go to Kelly. And Winckler said, "My facilities are available for packing."

Winckler says that he wanted a custom packing deal, a participation arrangement.

He didn't ask for that. He asked for that when he was dealing with his regular supplier, Morgan Ward. But he simply was notifying Finley that the capacity of his plant, 400 tons, was available. And Finley said he did not have any need for further capacity. All of his fruit had a home. [4608]

And here is the period, right in here (indicating), when that request was made, and the chart shows beyond any question that when Finley told Mr. Winckler that he had a home for all his fruit, he was telling the truth.

The only other time that the matter was discussed, and the only time, according to Finley, when Winckler asked for a participating contract, the TreeSweet kind, was in September. It was in September about this time of year, September 15th. The fruit available was low then, and the fruit available at that time was not sufficient to keep the frozen concentrate packers busy.

You will find this Exhibit FE, which is a tabulation of the Valencia orange utilization by Exchange Orange Products Company, by weeks. You can do, if you care to, what I have done: Strike a line across here in the middle of July. I think I may have said June. It was July when they had that first talk, middle of July, when Finley got the letter from Winckler, and here is what that will show. It will show that Cold Gold had only run 24 tons at that time, Hart's hadn't started any production of frozen, ELP hadn't started any production of frozen, Hyland-Stanford was not operating on its deferred payment plan, Mission Dry had no fruit, and TreeSweet had not yet commenced to run. It shows in total, if you add the columns across there, that the day in July when Winckler said that his plant was available, and Finley [4609] said that he didn't need it, that the total utilization of all facilities was 12,000 tons for

the week. And that is only about two-thirds of the available capacity.

Similarly, you can strike a line across here in September, and you will see here Hyland-Stanford is not operating, Mission Dry is not operating, ELP is, Hyland-Stanford is not, Mission Dry is not operating here on the deferred payment plan, and there again the utilization was 12,000, and only 12,000 tons. That was the time when Finley was cutting off the processors because of shortage of fruit.

There was a shortage of fruit for frozen concentrate. There wasn't enough. There was no surplus to go into single strength. And you will remember Finley's testimony that the reason for packing single strength was that they were afraid not to have some on the market under good California brand names during the coming season. The only reason that he packed any single strength that year was for that purpose.

Ladies and gentlemen, this damage suit rests upon a claim asserted by the plaintiffs that the defendants in what they did acted criminally, with criminal motives, against the plaintiff's business. That they conspired to restrain trade, they conspired to monopolize.

There is not one word of evidence in this record to show any monopoly or attempted monopoly, or any restraint of trade, or attempt to restrain trade, nor is there any evidence of a [4610] combination or a conspiracy between defendants and anybody else.

The plaintiff would have you sustain its bare asser-

tion of criminal illegality against these defendants upon surmise and inference.

Has there been pointed out here any possible motive or reason that the Sunkist people would have for punishing or doing anything to Mr. Winckler?

After all, he had a 400-ton capacity single strength plant. He had only 50 tons of frozen capacity. They had been doing business side by side there, not doing business with each other, for many years, there had been nothing happened to him, and there is no motive assigned for why Sunkist would want to do anything harmful to Winckler & Smith.

I wasn't here at the time of the opening argument, but I have read it, and I have reread it. Mr. Dixon in that opening argument said that he would show that Sunkist wanted to eliminate the competition of Winckler-Smith, because Winckler-Smith was a price cutter.

That was not shown.

Mr. Winckler, himself, said he was not a price cutter. He said sometimes his price was higher, sometimes it was lower, and sometimes it was the same as Sunkist's.

So there was no price cutting.

There is no motive described for what the plaintiffs [4611] claim was done to them.

I might say Case-Swayne was a price cutter. Admittedly they were trying to maintain a 15 cent differential below Sunkist.

He is still in business.

It is just inconceivable, I think, ladies and gentlemen, that there was any intentional injury to the

plaintiff, or any intent to affect his business in any other way.

Both the direct and the indirect evidence refute plaintiff's claim that there was intention to eliminate him from the industry.

You will recall in 1948, before during the first bankruptcy reorganization, Winckler had entered into a contract or had made a bid to enter into a contract for the production of concentrate for the school lunch program, and he was not able to fulfill that, because he had not had the foresight to assure himself of fruit in order to perform that contract. The Sunkist organization went completely out of its way to make it possible for Lynch, the receiver, to obtain fruit, deliver it under the contract, and they made a profit of $50,000, for which Mr. Winckler testified he thanked them, and the receiver thanked them.

Is that compatible with an intention to eliminate Winckler from competition? Is that compatible with Mr. Dixon's theory that since 1947 they were trying to conspire? [4612]

It certainly is not.

If they had desired to eliminate Winckler-Smith from the competitive field, Sunkist would have done nothing, allowed Winckler-Smith to default on a contract with the government and take his consequences, and that very likely would have been the end of Winckler-Smith.

But they didn't do that. They pulled him out of a jam.

Then Mr. Dixon has mentioned what I think is clear evidence that in 1951 there was no intent to

harm Mr. Winckler. In fact, Sunkist went out of their way to keep him from harming himself. That was the occasion in September of '51, when Mr. Winckler's organization, which admittedly had not processed any single-strength juice during the season, took an order from Ralph's Grocery for a carload of single-strength juice. It was not, as Mr. Dixon indicated, a transaction where Hildebrand said, "If you can't deliver me juice I am going to kick Anagold out of the store for good"; it was Mr. Hildebrand saying that, "You have a contract to deliver juice, and if you don't do it, Anagold is going out for good."

So what did Sunkist do then? They let him have a carload of juice, and they let him have a carload of juice at a time when they weren't offering it generally. And they let him have the carload of juice at the price which they had last quoted, and that was considerably less than the price at [4613] which they handled juice generally a few weeks after that.

They gave him a bargain. They went out of their way to keep him in business, and to keep him from defaulting on a contract with his principal customer.

Now, they say they charged him $400 more on a carload of juice than TreeSweet would have had to pay under the contract.

Well, that has no significance, ladies and gentlemen. If TreeSweet had come around and said, "We want to buy a carload of juice, one carload of juice," they would have had to pay the posted price.

It was only under this long-term arrangement, this arrangement under which they were committed to

buy 275,000 cases of juice, that they could get a lower price.

And on that sort of an arrangement, and that sort of quantity, you can't make a comparison of price with a spot transaction for one carload, isolated by itself.

Now, I think I have reviewed the evidence which we have introduced to show the policies, the lawful motives and the reasonableness of the policies and activities conducted by Sunkist on behalf of their growers; I think I have reviewed the evidence which shows that it was lack of business experience, lack of sound finances, lack of honest financial practices, that it was the working of economic forces, poor product, lack of good will, and the loss of a regular [4614] source of oranges to a competitor in single strength that were the real causes of the downfall of Winckler-Smith's business. [4615]

Sunkist, ladies and gentlemen, is a symbol of free enterprise by the growers. The growers don't have any quotas, they don't plow their crops under under Government directions. The growers are free to produce all the oranges they can, and when they produce those oranges, it is the function of the Sunkist organization to harvest, sell, and otherwise utilize those citrus products.

They have done it with such success against even the terrible competition from Florida that the citrus industry, I understand, is the second largest agricultural industry in the State of California.

You have heard Paul Armstrong testify. You saw his intimate understanding of the techniques of cul-

tivating, processing and marketing citrus and citrus products. You heard him explain why and how his Sunkist co-op had developed. You heard him trace the development of that co-op from the time when Mr. Storey, his predecessor, first set up this co-operative arrangement, because farmers were getting 10 cents a box. The span of Mr. Storey's contact and Mr. Armstrong's contact with the co-operative movement is about 70 years, and the accomplishments in that 70 years have made the Sunkist co-op system the model which the Government encourages other agricultural interest to follow.

It could not have been based on the sort of immoral, unethical, illegal conduct that has been charged here. [4616]

There is a principle involved in this litigation over and above money, ladies and gentlemen. Armstrong, the whole Sunkist system, defend themselves against what they regard as an utterly false charge, that they conspired with criminal intent and committed criminal acts.

Here is what Armstrong testified.

"Do you know of any instance in which any member of the Sunkist organization or of its components made or refrained from making an arrangement for the use of independent processing facilities for the purpose of or with the hope of eliminating any independent processor from the competitive field?

"A. No. There was no such intent on my part or on the part of anyone within the organization. I know that."

Ladies and gentlemen of the jury, if you believe Paul Armstrong, you will find a verdict of not guilty. Unless you believe that Paul Armstrong and his Sunkist co-operative stooped to perpetrate a foul and unfair wrong on Winckler-Smith, you will, I am sure, return a verdict of not guilty. That I submit is what the evidence calls upon you to do.

Thank you for the many weeks that you have given faithfully. I want to thank you for the attention. [4617]

* * *

CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

Mr. Dixon: May it please the court, ladies and gentlemen of the jury.

As his Honor has told you, as I am sure you are all aware, this is not a criminal case in which Mr. Armstrong or any other individual connected with Sunkist or EOP is on trial and is charged with any commission of any criminal act. This is a civil case brought by the plaintiff which contends, and we submit the evidence supports our contention, that it has been damaged and is entitled to relief under the antitrust laws in accordance with the instructions as his Honor will give them to you. [4618]

Before I make any effort to answer some of the contentions of the counsel for the defendants in his closing argument, I would like to refer to just one of the statements which he made and which seems to me in a sense typifies many of his statements made with

reference to the evidence in this case and indicates perhaps the fact that you will, as I know you will, analyze and consider all of the evidence in this case before reaching any decision.

Counsel stated something with reference to the 1947 deal that you have heard something about and said that the previous experience of Sunkist with the plaintiff in this case was such that they didn't want to do any business with them, that there was a batch or several batches of product that was processed under that deal in 1947 that had to go down the sewer, that they didn't find out about it until this company went into bankruptcy, which was some time in 1948, and it didn't go into bankruptcy, I remind you, it went in for reorganization under Section 11 because of inventory losses it sustained in the manner I have previously discussed.

Don't take my word for it, ladies and gentlemen. I merely suggest that you read Exhibit 56 and Exhibit 57, which deals with this transaction and arrangement, and refer particularly to 56, in which you will find that the plaintiff who was performing this contract provide samples as the work went forward for inspection and examination, and we [4619] assume that that was complied with.

There was, as Mr. Winckler testified, some difficulty about specks, but nothing with reference to anyone else.

This contract, ladies and gentlemen of the jury, was for the British Ministry, so we presumed that this orange concentrate was not kept around after it was processed, but it was shipped, and yet counsel

made the statement that they didn't find out about this difficulty until after the company had the reorganization proceeding in 1948.

I merely submit that to you, ladies and gentlemen, to indicate the necessity of carefully analyzing the contracts or the evidence in this case before you arrive at any final conclusion with reference to what the evidence shows or what it doesn't show.

Now, first, some discussion was had by counsel about the fact that the growers here that are members of Sunkist occupy some special place in our economy. They aren't any different, ladies and gentlemen, after they have started to do business, than you or I or any other business man who is endeavoring to compete and make a living in our free enterprise system. They are given the right to organize and to market their product. That's all. They are not given a right, ladies and gentlemen, as I am sure his Honor will instruct you, to enter into arrangements such as the plaintiff contends were entered into in this case with their [4620] competitors which had the effect of eliminating competition, not only between themselves, but because of the control over the price at which the product which the plaintiff had to have to remain in business, was kept up at a time when there was an abundant supply, so that the law of supply and demand did not govern that price, merely to protect those who had purchased previously, according to testimony of Mr. Kelly and Mr. Finley, from the company that had the monopoly control.

I will briefly deal with the question of monopoly

control because counsel has said that the plaintiff could have got plenty of oranges from many sources in 1951, and he points to the fact that the plaintiff did get some from Morgan Ward. That is true. But let us get back to the facts, ladies and gentlemen.

It is not disputed here that the defendants had at least 65 per cent of all of the products oranges available for processing in 1951. Now, where is the balance of it? It is in the record here. You remember Mr. Ward's testimony, and I think the same perhaps in a sense came from Mr. Finley, but we rely on Mr. Ward, a competitor of Sunkist, to tell you where the rest of it was.

The Independent Fruit Growers represented by Mr. Ward was a co-operative growers organization, the same as Sunkist, and what did he say? On examination he stated that Exchange, [4621] that is Sunkist, and M.O.D. and American Fruit Growers were the only supply available to independent processors, and as previously stated, this is a summary of his testimony, M.O.D., that is another co-operative and American processed their own fruit and didn't sell any, so that the only other source, ladies and gentlemen, from which the plaintiff could get any oranges at any time in any quantity necessary to operate their plant was from Ward, Morgan Ward and his co-operative organization of growers.

Now, Mr. Ward said he sold about 12 to 15 per cent of the total supply of the 100 per cent available. Let's eliminate all M.O.D. and American Fruit Growers had of the balance of 30 per cent that was remaining after Sunkist had theirs taken care of.

and what is left? The only amount that could come into the market for an independent processor such as the plaintiff, ladies and gentlemen, was what could come from the Morgan Ward organization of independent growers.

What did he say? What is his testimony about why he made this contract, not only with Case-Swayne, but with the plaintiff in 1951? He was asked these questions.

"Well, about the price, my price was the same price as California Fruit Growers Exchange, $40 a ton on 120 pounds solids, and since I couldn't sell it at that, I was forced to go into contracts such as I did with Paramount, with Winckler and [4622] with Case-Swayne, which constituted better than 80 per cent of all fruit that season. You couldn't sell a great percentage of it for $40 a ton."

Of course he couldn't, ladies and gentlemen, because what processor could pay that price unless they had a deal like TreeSweet had with Sunkist in which they didn't have to pay anything for it.

But he goes on:

"Because we have no more customers left"—that is his testimony——

"I only had three plants, Case-Swayne, Winckler & Smith and Paramount, that I could even get to run for me. All the rest of the facilities for running were taken up in the state."

Ladies and gentlemen, I want you to get back to that, because one of the charges here is monopoly control over this industry by the defendants, and the inference is the facility to control under the Hyland-

Stanford contract, and the various other contracts, all those that you have heard mentioned before in this argument.

He said further, and this is on cross-examination, not my cross-examination:

"I think that was the first year we ever worked on a participating deal with any processor, because we were faced with a situation, I don't think in the [4623] whole history of the citrus business the situation had been any worse as far as our standpoint is concerned.

"Q. What was unusual about the situation?

"A. Too much fruit. Too much fruit and very few facilities to have to run it."

That is the situation, ladies and gentlemen, and yet the defendants in this case say that the plaintiff was put out of business because of the Florida situation, because the law of economics operated against him.

Well, it certainly did in this case, and how did it operate against the plaintiff? To get back to our original contention, TreeSweet and Sunkist and its subsidiary, Exchange Orange, combined to sell—Sunkist sold, Exchange Orange did the processing end of the business, so that this price was to be $40 a ton on the basis of soluble content. If you wanted to buy, you had to go to Kelly and pay his price. Anyone who wanted any other arrangement, the only place they could go to was EOP and Mr. Finley, and when he got there, what did the plaintiff say? He didn't know anything about this deal with TreeSweet at that time, ladies and gentlemen. That

contract was unknown to us and everybody else in the industry until 1952, after this lawsuit was filed. But something was wrong, and so the plaintiff asked the defendant, in his letter he said: [4624]

"We have facilities available for processing"—if you will read the letter——

"under your supervision, if you want it, and inspection."

There wasn't even a reply to that letter, ladies and gentlemen. I know now why there wouldn't be, because of the arrangement here with TreeSweet which was given first call on the entire crop in the sense of anything that went into single-strength Valencia juice, because, don't forget that in 1951, as in previous years, they processed over 20,000 tons, more even than Exchange Orange, but merely because it happened to be the TreeSweet label, according to Mr. Finley, and not the Anagold label, TreeSweet was the favored processor because of this monopolistic control of a company which was able to exercise that control, and they did exercise it in the manner which I have described in my argument before.

Now, counsel went into a discussion of what caused the decline here, I mean the plaintiff going out of business. He said it was a decline of sales in 1949. Of course, there was of Valencia sales because there were lesser oranges available—in 1950, I mean, not 1949, but 1950. In 1949 there were plenty of them. In 1950 there was a lesser amount and the price went up twice, you recall, so the plaintiff didn't buy as much, because it didn't want to take a chance of get-

ting into the same situation it got into which [4625] caused the reorganization in 1948.

In 1951, of course, you know what the situation was.

But compare that with what TreeSweet was getting all this time. Was TreeSweet having to concern itself at all about the Florida situation? Did they have to concern themselves about what Sunkist was selling oranges for to the other independent processors? Did they have to concern themselves about where they were going to get money to finance the corporation, I mean the amount that they processed? Did they have to concern themselves with whether they would have to go out and borrow money for operating capital for the seasonal operation from a bank?

No, ladies and gentlemen. The contract answers that question better than I can, and the facts show clearly that they had none of those problems.

Wouldn't you and I like to have that kind of arrangement?

The plaintiff could, indeed, had that kind of deal been available to it, it would never have had any financial troubles of any kind, would never have to borrow money form any source whatsoever.

But what is the background? In accordance with the principles of our free enterprise system, as I said yesterday, and the initiative of American businessmen, Mr. Winckler who did most of the work in this company, who built it up with his energy and his capital—true, it is small, but [4626] if that is to be charged as a crime in our free enterprise system,

then let all small business fall by the wayside. Let's never start any business and let's never put any money into any institution or corporation unless we are sure we have enough to compete with someone who has a business like Sunkist with $125,000,000 a year, and who can afford to pay a million and a quarter for a trade name, and to spend a million dollars a year on advertising.

I don't believe that is the principle under which our free enterprise operates. I know it is not, because the very purpose of the Sherman Act under which you are going to decide this case sets up the rules of the game. Regardless of whether you are small or big, the rules of the game apply to everybody regardless of whether it is a marketing co-op, whether it is United States Steel, Ford Motors, or whether it is Winckler & Smith. So that is the situation.

Let's get back to that point and let's consider the evidence from that situation and not whether or not the co-op, this defendant Sunkist, has done a wonderful job for the growers, because that isn't the question. [4627]

That is just the mere effort to throw a little smoke in your eyes, so that you don't see the real issue in this case, which is whether or not, ladies and gentlemen, there has been an abuse of a legal monopolistic power by this defendant in a manner which has eliminated competition in this industry. And I submit that if economics mean anything at all, and they were called and referred to by this defendant constantly as causing the downfall of this plaintiff cor-

poration, particularly the Florida situation, why, ladies and gentlemen, to me it is just fundamental economics that when you have an abundant supply, such as was available in 1951, and you have—and bear in mind Exchange Lemon had to throw out at least 3,000 tons that they couldn't process because they weren't good enough, they were spoiled—that under those circumstances, if you had the real interest of your buyers, and the buyers in this case were the plaintiff Winckler & Smith, they were a potential buyer, just as much as anybody else, if TreeSweet didn't have this contract they would have been a buyer, and if Silzle didn't have it—they started out as a buyer, but they didn't stay on that basis very long—the economic and fair thing to do, if you wanted to treat all processors alike, and that is what they purported to want to do, but they didn't, they kept their $40 price up there, ladies and gentlemen, and as a result of that, with their monopolistic control of the product that was available, this plaintiff was put in the position [4628] where it couldn't acquire from any source, whether it was Sunkist or Morgan Ward, any oranges on a basis where he could buy them and process them into single-strength juice, and sell it at a price which would be competitive in this market.

Now, everybody else seemed to be able to do it. TreeSweet did it, Silzle did it. And of course you know how Case-Swayne did it with 20 per cent, that is all, of their production. That wasn't their main source of product and operation expense. But the plaintiff who relied upon it, because the plaintiff

had the foresight in 1950 to spend some money, and there is about $100,000 here spent in developing new processing facilities in this plant of the plaintiff, they had the foresight to do that, they did get some of the Morgan Ward oranges in 1951 to process into frozen concentrate, ladies and gentlemen, the rest of it went to Case-Swayne, and you heard the testimony of Mr. Ward as to why he let them have the single-strength oranges that were available for processing into that form, and why he gave the rest of it to the plaintiff in this case.

But that isn't the question. The question in this case is whether or not this combination had the power to do what the plaintiff claimed they did, whether in combination with TreeSweet, in particular, they were able to control and dominate the amount and the quantity and the price at [4629] which single-strength orange juice was sold in this area and in other parts of the country.

Well, we contend, and we submit, that the evidence clearly shows that they had that power, that they did combine, and that as a result of keeping this price up at $40, and as a result of not making anything else available to the plaintiff, or any other processor except the favored one, that the plaintiff was eliminated as a competitor in this industry.

The Court: You have had about 20 minutes now. You wanted me to warn you.

Mr. Dixon: Thank you, your Honor.

I want to come down briefly to the question here of the capital invested in this plant by the plaintiff and the stockholders of that company.

One of the reasons they say that the plaintiff failed was because they didn't have adequate capital.

Well, there, again, capital, ladies and gentlemen, let me remind you of this fact, that after they came out of the reorganization in 1949, and they came out clean, no debts, that is true, but they needed some capital, and they got it, with practically only what was loaned to the corporation by the stockholders, trying to rebuild this business, and what happened? They made a profit of $120,000 in that year, because they had a plant, because they had good management, and because they had the customers, and because they had a trade [4630] name, ladies and gentlement, the Anagold label.

The defendants say they didn't have anything. No good will at all.

Well, let me say this, in answer to that, ladies and gentlemen. That if they had no good will, and if the Anagold label didn't mean anything, why was it that in 1951 when the plaintiff couldn't produce or process any single-strength juice for its customers, and was endeavoring to keep what they had, their customers, that right here in this area Ralph's, a good customer, and a large chain, told the plaintiff, well, you better get us some more of your juice or we will take your whole line out entirely.

In other words, there was acceptance of the Anagold brand in 1951 by one of the large chains in this area. And in order to keep that business, even at a loss, the plaintiff went to Sunkist, through the sales

manager, and got the 1,400 cases that have been referred to.

Now, about the computation of the damages.

I want to suggest to you, ladies and gentlemen, that this is the question: Whether you are going to believe Mr. Hodge, who was the accountant, and he is a certified public accountant, who kept the books and records of this company all during the periods in question, and whose entries were examined by the defendants and their auditors, who were well paid for what they were doing—you are going to have to decide [4631] whether you will take Mr. Hodge, who prepared this estimate of what the 12,000 additional tons would have meant to the plaintiff had they been available, or whether you are going to take the notions of Mr. Regan and Mr. Lynch. And they admitted on cross-examination, you will recall, that they had never been in a processing plant, they knew nothing about the business, this was their first experience with it, yet on that basis they would have you believe that this plaintiff by having an additional 12,000 tons available to it in 1951—that isn't too much, ladies and gentlemen, that is probably what they would have processed in 1951—that instead of making a profit of $20,000, which would include the recovery of the loss that is referred to, and which was actually sustained, that they would have lost more money.

In their computation, you will recall, good will, they said, why, on our basis it was worth a minus close to one million dollars.

I don't know how they figured it, but I am not sur-

prised. They weren't in the citrus business, they were paid to do a job, and they did it well. And it is up to you, ladies and gentlemen, to decide which of these two, Mr. Hodge, or Mr. Lynch and Mr. Regan, you are going to give credence to when you arrive at a determination of what amount should be allowed the plaintiff in this case.

I am sorry that I don't have time to answer some of the [4632] other arguments, but in closing I just want to say this. The issue in this case is clear, ladies and gentlemen. This is an important case to the plaintiff, of course, it is an important case to the defendants, but as I stated before, it is equally as important, and perhaps much more so, to the free enterprise system, that you determine, when considering this case, whether or not a company as small as this one was, relatively speaking, is going to be treated equally, and have an equal opportunity. That is all the plaintiff asks in this case, that is all it ever asked of the defendants or anyone else. They didn't ask any special privileges. They merely said, we want equal consideration, at least.

Why?

Because you control the price. The price is too high. And even then, try to give us something, at least, so we can remain in business. Our processing facilities are available.

When we find out about this contract, as we did after the lawsuit, we merely ask that equal treatment and consideration be given to this plaintiff in your deliberations, as the defendant gave to its competitor TreeSweet for a period of five years, which was

wholly unknown to anyone else in this industry, ladies and gentlemen.

If you examine the evidence, you will see that the only one that had a producer's contract, whatever they call it, [4633] was TreeSweet during all this period of time. Mr. Finley said he wouldn't give it to anybody else in the industry.

That is the answer to the question whether there was a combination here, and a conspiracy as charged in violation of the antitrust laws. Whether it operated to eliminate competition between the companies and between this plaintiff, by making it unable for it to secure any oranges. If there hadn't been that contract, I submit, with the surplus, the price would have gone down, the plaintiff would have made some orange juice and been able to compete and stay in this market.

It was eliminated.

The monopoly over the juice part of the market was perfected. TreeSweet, Silzle, and Exchange Orange accounting for 85 per cent of the total amount produced during the 1951 season.

So in closing we ask you to consider seriously, and I know you will, the fact that the free enterprise system is involved in this case, American initiative, and that we, the plaintiff in this case, are entitled to the protection of those laws as you see that they may apply to the evidence in this case. And after considering all the evidence, we are sure that you will find, not that the defendants have, as individuals been nice people—they are not charged here with any criminal act—but find that there was a violation

under the law, the antitrust laws, which proximately caused damage [4634] to this plaintiff in the amount which you will determine, based upon the considerations that I discussed and left with you yesterday.

In closing, let me thank you for the very careful consideration you have given this case, and the attention that you have given all of the evidence. I am sure and confident that in your deliberations you will consider the evidence and weigh it carefully. We are not asking for any privileges or favors. We are merely asking for equal consideration with the defendants in this case of a kind that we think any manufacturer or processor in this business is entitled to. Having determined that we are, if you so find, proceed then to determine the amount of damages that we claim we suffered in this case.

We are content, ladies and gentlemen, under the jury system, which is the backbone of our system of justice, to rely on and to submit to your judgment, and to submit the question to your consideration.

Thank you very much. [4635]

* * *

COURT'S INSTRUCTIONS TO THE JURY

The Court: The record will show the jury present and counsel present.

I have a tendency to talk too fast, not to speak up, so I am going to try to cure both of those in these instructions. In fact, I am going to try to read these instructions so that if one of you doesn't understand

one, I want you to put your hand right up at that time and I will go back over and read it.

This has been a long case and when the case finally goes to you, I am going to make some suggestion about your deliberations. Certainly, they shouldn't be hurried. You can work some tonight. We won't expect probably to hear from you until at least some time tomorrow. You can set your own schedule, but both sides are entitled to fair consideration of this record and the exhibits. I want you to go about it in a leisurely manner.

The old English judges used to instruct the jury orally. The judge didn't read anything to them. It is too bad we don't have the ability today to do that. I know that I could talk to you about this case much easier than I can read instructions. However, if there is any case that is difficult, it is an antitrust case, and the instructions tend to be technical and intricate and, of course, the old English judges probably didn't have those kinds of cases. They are products of our modern age. [4639]

So that you are up against the problem of my having to read to you a large number of instructions. They are divided roughly into some general instructions to start with, some instructions on proximate cause, some instructions on conspiracy, some instructions on the plaintiff's claim, a set of instructions on the contentions of the plaintiff, and the contentions of the defendant, and some instruction on the antitrust laws, some miscellaneous instructions as to certain of the evidence, instructions on

damages, and some general instructions that wind the matter up.

Members of the jury:

You have heard the evidence and the argument. Now, it is the duty of the court to instruct you as to the law governing the case. It is your duty, as jurors, to follow the law as stated in the instructions of the court and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court.

You have been chosen and sworn as jurors in this case to try the issues of fact present by the allegations of [4640] the complaint of the plaintiff, Winckler & Smith Citrus Products Company and Ronald Walker, Trustee and Intervener, and the answer thereto of the defendants Sunkist Growers, Inc., a corporation, sued as the California Fruit Growers Exchange, and the Exchange Orange Products Co., a corporation. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The parties and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by

the court, and reach a just verdict, regardless of the consequences.

Let me summarize here and say that you are the sole judges of the facts. You must take the law as given to you. This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life.

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his case by a preponderance of the evidence; and if the plaintiff fails to prove any essential element of his case by a preponderance of the evidence, then you must find for the defendant.

The term "preponderance of the evidence" means the [4641] greater weight of the evidence. In other words, such evidence as, when weighed with that opposed to it, has more convincing force and produces in your minds conviction of the greater probability of truth.

If your minds are in even balance on any issue, you must decide that issue for the defendants and not for the plaintiff. The plaintiff does not have to persuade you beyond a reasonable doubt, but it does have to persuade you that it is the more probable version.

Evidence may be either direct or indirect. Direct evidence is that which in itself, if true, conclusively establishes a fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, even though true, does not itself conclusively establish the fact in question, but which

affords an inference or presumption of the existence of such fact. Indirect evidence is of two kinds, namely, presumptions and inferences.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved. A presumption is an inference which the law requires the jury to make from particular facts. Unless declared by law to be conclusive, a presumption may be overcome or outweighed by direct or indirect evidence to the contrary of the fact presumed; but unless [4642] so outweighed, the jury are bound to find in accordance with the presumption.

Now, let's see if I can simplify that for you. Direct evidence, we know what that is. Somebody testifies to a certain fact. The credibility of that witness is for you, whether you believe him or not. A written contract is direct evidence. You may draw inferences from it, but you must interpret the contract as it is written.

An example of inference, a very crude one, would be a person is standing somewhere and they hear a shot fired across the street and they see a man fall down. They walk over and find a bullet hole in the man. They never saw the bullet leave the gun and enter the man's body. But reason and common sense from those facts, the explosion of the gun, the man falling with a hole in him, leads you to draw an inference that one man shot the other. That is a very easy inference to draw, but that is what we mean by inference. You are not bound by the bald statement

of any witness. In drawing those inferences, reason and common sense tell you what to draw.

As to presumptions, the instruction is that a presumption is an inference which you must recognize and draw. The most common presumption we have is that which accompanies every witness who gets in the box, that he is presumed to speak the truth. That is an inference which you are required [4643] to draw. But that presumption in that particular case is not conclusive and may be overcome, and so forth.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such inferences as seem justified in the light of your experience.

You, as jurors, are the sole judges of the credibil-

ity of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the [4644] witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollections, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilfull falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, [4645] as you may think it deserves.

The rules of evidence ordinarily do not permit a

witness to testify as to his opinions or conclusions. An exception to this rule exists in the case of an expert witness. A witness who by education and experience has become an expert in any art, science or profession, may state his opinions as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness [4646] or give it such credibility as you may think it deserves.

While the burden rests upon the party who asserts the affirmative of an issue to prove his allegation by a preponderance of the evidence, this rule does not require demonstration, or such degree of proof as produces absolute certainty; because such proof is rarely possible.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact, if the evidence favoring such party's side of the question is more convincing than that tending to support the contrary side, and if it causes the jurors to believe that the probability of truth on such issue favors that party.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against the testimony of a lesser number of witnesses or other evidence which does produce conviction in your minds.

The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witness and which evidence appeals to your minds as being most accurate and otherwise trustworthy.

The testimony of a single witness, which [4647] produces conviction in your minds, is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even though a number of witnesses may have testified to the contrary if, after weighing all the evidence in the case, you believe that the balance of probability points to the accuracy and honesty of the one witness.

A corporation can act only through its officers, agents or employees. Any act of an officer, agent or employee of a corporation in the performance of his duties is held in law to be the act of the employer.

It is for you to determine whether the 16-man executive committee, and the committee of managers,

if such you find, and the members thereof were acting, if such you find, in the performance of their duties and whether, if they acted, they acted for Sunkist, or EOP, or ELP, or all or some or none of such entities.

The proximate cause of an injury is that cause which, operating in natural and continuous sequence, unbroken by some other and superseding cause, act or force which in itself becomes the sole cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish an injury. [4648]

This does not mean that the law seeks and recognizes only one proximate cause of the injury, consisting of only one factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, two or more acts or forces may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or forces is regarded in law as a proximate cause.

I have here some general instructions on conspiracy.

I charge you that no formal agreement is necessary to constitute a conspiracy or combination. A combination or conspiracy in violation of the law or statute may be inferred from a course of dealing as well as through direct exchange of words. An unlawful conspiracy may, and often is, formed without simultaneous action or agreement on the part of the conspirators. It is not necessary to a conspiracy that all of the conspirators be a part of the conspiracy

from the beginning. A person may join a conspiracy after it has been agreed upon.

You are instructed that men or entities who combine for illegal purposes will normally not tell openly everything about their purposes. Thus, it is often impossible to prove the existence of an illegal agreement by what is known as direct evidence. Very [4649] often, particularly in conspiracy cases, there cannot be direct proof of the making or existence of an illegal understanding. The acts of the parties over a period of time, their course of conduct and declarations, either written or oral, and all the surrounding circumstances may then be considered by you for the purpose of determining whether or not an illegal understanding was entered into. [4650]

It is sufficient if there is a concert of action, all of the parties working together understandingly, with a single design and for the accomplishment of a common unlawful purpose. It is not necessary that each conspirator have knowledge of all the details of the conspiracy, or the means to be used; nor is it necessary that the conspirators should meet together, in order to constitute an unlawful combination. If they have a mutual understanding, and act through one or more individuals as a consequence of such mutual understanding, the conspiracy is complete.

The acts of a conspirator after the conspiracy is formed and while it is in existence, done in furtherance of the conspiracy, binds all the other coconspirators. Any admission of a conconspirator binds only the conspirator making the admission.

Each party must be actuated by an intent to pro-

mote the common design. If persons pursue by their acts the same unlawful object, performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Co-operation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, [4651] with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

I charge you that the acts of The Exchange Orange Products Company may be the acts of its parent corporation Sunkist Growers, Inc. I further charge you that a parent corporation and its wholly-owned subsidiary can be guilty of combining or conspiring together to violate the anti-trust laws. The defendants Sunkist Growers, Inc., and its wholly-owned subsidiary Exchange Orange Products Company, can accordingly combine or conspire together or with others to violate Sections 1 and 2 of the Sherman Act as charged in the first and second

causes of action, subject to other instructions concerning the Capper-Volstead Act, and Section 6 of the Clayton Act, and the exemptions contained therein.

I charge you that acts lawful in themselves become unlawful when part of an illegal scheme or plan or when used to accomplish an illegal purpose. If you find as a fact that either or both of the defendants combined or conspired with [4652] Tree-Sweet or Silzle as charged in the first and second causes of action, and that any one or more of the acts alleged by the plaintiffs to have been committed pursuant to the combination or conspiracy were committed by either one of the defendants or coconspirators, that you find were a party to such combination or conspiracy, that the act or acts so committed would then become the act of all members of the combination or conspiracy.

Plaintiff need not show that any of the acts which the defendants are alleged to have performed in combination under the first cause of action were done with the specific intent of eliminating the competition of the plaintiff in the interstate market for citrus fruit juices. It is sufficient if you find that any acts charged by the plaintiffs to have been done pursuant to the combination alleged actually and necessarily resulted in the elimination of the competition of the plaintiffs in such market since everyone is presumed to intend the natural and probable results or consequences of his conduct or business arrangements.

You will note that I have said you need not find

a specific intend. However, the very charge of conspiracy requires the intent of the parties acting in conspiracy or combination.

You have been told that the plaintiff corporation is in reorganization under Chapter XI of the Bankruptcy Act, and [4653] that Mr. Walker, whom you have seen in the courtroom, is the trustee appointed by the court to look after plaintiff's affairs during reorganization. You are instructed, however, that as against the defendants in this case, Mr. Walker's rights as trustee are no different from, or any greater than, the rights of the plaintiff corporation itself. For the purposes of this case, Mr. Walker simply stands in the shoes of the plaintiff.

The plaintiff alleges that it has sustained injuries, proximately resulting from six specific items or matters set forth in the second amended complaint, and has sustained general damages in the sum of $800,000.

These allegations are not evidence, of course, but merely the extent of the plaintiff's claims, and must not be considered by you as evidence.

Neither the allegations of the complaint as to the amount of damage plaintiff claims to have suffered, nor the prayer asking for certain compensation, is to be considered by you in arriving at your verdict, except in this one respect, that the amount of damage alleged in the complaint does fix a maximum limit, and you are not permitted to award plaintiff more than that amount.

The court will now attempt to inform you as to

what are the plaintiffs' contentions and what are plaintiffs' theories in this case. Please bear in mind that these are, as stated, [4654] the contentions and theories of the plaintiff. The court will subsequently inform you as to the the defendant's theories and contentions.

The plaintiff contends first, as a preliminary matter and as background for the entire setting of the case, that the defendants, Sunkist and Exchange Orange Products, had a monopoly of product Valencia oranges in the California area, and the Exchange Lemon Products, not a defendant but an alleged co-conspirator in this case, had a similar monopoly of products lemons in the same area.

Plaintiff concedes that defendants, Sunkist and Exchange Orange, could legally acquire a monopoly of the Valencia product oranges available for processing into citrus juices processed in the California area, and likewise concedes that Exchange Lemon could also acquire a legal monopoly over the amount of product lemons that might be available for processing into lemon citrus juices, in California.

We come then to what plaintiffs contend are violations of the antitrust laws by the defendants and what the plaintiffs contend are the proximate causes of the plaintiff's alleged damage. Plaintiffs contend that the defendants and alleged co-conspirators combined, conspired and contracted to restrain interstate trade and commerce in California citrus juices and particularly single-strength Valencia juice processed in California and sold in in-

terstate commerce in 1951, in violation [4655] of Section 1 of the Sherman Act.

Plaintiffs further contend that the defendants and co-conspirators combined or conspired to monopolize the market for California citrus juices and particularly single-strength Valencia orange juice processed in California and sold in interstate commerce in 1951, in violation of Section 2 of the Sherman Act.

Plaintiffs further contend that the defendants actually monopolized the processing and marketing of California citrus juices, particularly single-strength Valencia orange juice, processed in California and sold in interstate commerce in 1951 in violation of Section 2 of the Sherman Act.

Plaintiffs further contend pursuant to the combination, conspiracy and monopolization charged by the plaintiff that the defendants and alleged co-conspirators committed certain acts and engaged plaintiffs' claimed damage. These six specifications which plaintiff alleges were the proximate cause of plaintiffs' claimed damage. Theses six specifications will be referred to in these instructions as the "acts complained of" and I will instruct you further as to plaintiffs' allegations and contentions in these six specifications. [4656]

Now, let me say further in this connection that you will note from that last instruction that there is a reference to two alleged monopolies. You must keep these contentions in mind in analyzing this case.

The first alleged monopoly spoken of was the monopoly over product oranges, and I informed

you plaintiff concedes that was a legal monopoly. I will instruct you later as to how a legal monopoly might become illegal by things that were done. Plaintiff concedes it is to start with a legal monopoly, because these statutes I am going to read as soon as I get to them on the Capper-Volstead Act and the Clayton Act exempt marketing associations from violations of the antitrust laws. So that as far as this alleged monopoly on product oranges is concerned, which the defendants deny exist and which plaintiff contends exists, in any event, if it did exist, it was a legal monopoly on product oranges, because that is what these marketing associations were in part set up to do.

I told you the defendants deny that there is a monopoly over product oranges. Plaintiffs say there is. Plaintiffs say that that monopoly could have been legal, a legal monopoly, but plaintiffs say defendants misused or illegally used that monopoly which started out as a legal one.

Now, the second monopoly that is talked [4657] about, plaintiffs' allegation is that the defendants monopolized the market in the juices apart from the product oranges. I think you are entitled to keep this in mind in considering both the plaintiffs' contentions and the defendants' contentions.

Now, I will go ahead. I just wound up by telling you about the six acts which we will talk about, the acts complained of or the acts alleged.

In a civil damage suit under the antitrust laws, the plaintiff must go farther than merely to rely on proof of a violation of the antitrust laws. The plain-

tiff must alleged and prove the particular acts or conduct or happenings which it is claimed caused the damage. Here the plaintiff particularly complains of six matters, which will be referred to in these instructions as the "acts" alleged by plaintiff.

1. The alleged oral contract between Exchange Orange and Exchange Lemon, under which it is alleged that Exchange Lemon processed oranges for Exchange Orange during the 1951 processing season.

2. The alleged oral contract between Exchange Orange and Exchange Lemon, under which it is alleged that Exchange Orange processed lemons for Exchange Lemon during 1951 processing season.

3. The allegation that Sunkist and [4658] Exchange Orange Products agreed "to establish and maintain the price to independent processors like the plaintiff" of product oranges, and the allegation that the price made it impossible for independent processors, such as plaintiff, to acquire product oranges from Exchange Orange or any other sources at a price or under arrangement enabling plaintiff or other independent processors to compete with defendants and TreeSweet and Silzle.

4. The contract between Exchange Orange and TreeSweet in 1951.

5. The contract between Exchange Orange and Silzle in 1951.

6. The allegation that Exchange Orange refused to give plaintiff, upon request, a similar contract.

It is also alleged by plaintiff that the contracts referred to alone were performed and carried out.

The other contracts entered into evidence between Exchange Orange and Hyland Stanford, Harts, Case-Swayne, Mission Dry and General Foods, also referred to as Bireley's, were offered and received for the general purpose of showing the operations of Exchange Orange and such bearing as they may have in general, but are not claimed or alleged by the plaintiffs to be any cause of their claimed damage.

The court will now attempt to advise you concerning [4659] the contentions and theories of the defendants in this case.

It is defendants' position, first of all, that they did not have a monopoly of products oranges or a monopoly of the business of processing the oranges and selling the juice in interstate commerce. Defendants contend that such monopolies would have been lawful, if they had existed, because of the statutes relating to marketing associations, but they deny that there were such monopolies.

With respect to lemons, it is defendants' position that whether Exchange Lemon had a monopoly of products lemons or of the business of processing and selling lemon juice, is immaterial in this case, since, defendants claim, the plaintiff was not in the lemon juice business except in a very minor way.

In any event, defendants deny that they misused any power that they may have had with respect to products oranges or lemons.

Defendants also deny that they violated the antitrust laws in any way. They deny they combined or conspired with Exchange Lemon, TreeSweet and

Silzle, or any of them, to restrain trade and commerce in single-strength Valencia orange juice or and other citrus fruit juice processed in California and sold in interstate [4660] commerce, or that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to suppress or eliminate the competition of the plaintiff.

Defendants also deny that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to monopolize the market for single-strength Valencia orange juice or any other citrus fruit juice processed in California and sold in interstate commerce, or that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to exclude the competition of the plaintiff from such market.

The defendants also deny that they and Exchange Lemon and TreeSweet and Silzle, or any of them, actually monopolized the market for single-strength Valencia orange juice or any other citrus fruit juice processed in California and sold in interstate commerce.

With respect to the six acts complained of as causing plaintiff's damage, defendants contend that such acts were lawful and that they were not performed pursuant to any combination or conspiracy or for the purpose of restraining or monopolizing trade and commerce or for the purpose of injuring the plaintiff.

It is also defendants' contention that they were under no legal obligation to do business with the plaintiff, and that even if defendants had had some

obligation [4661] to do business with independent processors generally, there was ample justification for not doing business with the plaintiff.

Defendants contend, finally, that what happened to the plaintiff in 1951 was caused, not by any act of the defendants, but by the general economic conditions in the citrus fruit industry and by plaintiff's lack of capital and the mismanagement of its business. [4662]

Now, we get more into the antitrust problem. Section 1 of the Sherman Act reads as follows:

"Every contract, combination in the form of trust or otherwise, conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.. * * *"

That is part of the section.

Then the law holds that restraint referred to in the statute must be an unreasonable restraint.

Section 2 of the Sherman Act provides, in part, that no person "shall monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * *"

There is but one combination or conspiracy charged in this case, namely to restrain trade and commerce and to monopolize. Combination and conspiracy mean substantially the same thing.

The first cause of action charges a combination or conspiracy to restrain trade and commerce. The second cause of action charges a combination or conspiracy to monopolize and also charges actual monopolization. But if plaintiff's case is proved plaintiff may have but one recovery.

The same acts or course of conduct may violate both Section 1 and Section 2 of the Sherman Act. The jury may find [4663] that the acts or conduct only constituted a violation of Section 1 and not Section 2, or constituted a violation of Section 2 and not Section 1; or it may find that it constituted a violation of both sections or that no violation of either section occurred.

You have those alternatives before you.

The Federal Antitrust Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

This is a general statement and is subject to the more particular instructions contained herein.

The purpose of the antitrust laws is to preserve the freedom of interstate trade and commerce, to secure unrestricted equality to engage in such trade, and to protect the public against the evils incident to the destruction of competition, by striking down combinations which tend unduly to interfere with the free exercise of the right of those engaged or desiring to engage in such trade, or which may tend directly to suppress competition therein.

The complaint defines citrus fruit juice as natural and frozen concentrate juice produced from by-products fruit.

I charge you that the single-strength orange juice and other citrus fruit juices produced in California and sold in intra and interstate commerce constitute part of the total trade in commerce in these

products and may be the subject of [4664] restraint and monopoly under the Sherman Act.

You are instructed that the defendants Sunkist and Exchange Orange and the alleged co-conspirator Exchange Lemon are co-operatives entitled to the exemptions from the antitrust laws as are afforded by Section 6 of the Clayton Act, which is one of the antitrust laws, and by Section 1 of the Capper-Volstead Act, which relates to associations of producers of agricultural products. Section 6 of the Clayton Act provides, in part, "nothing contained in the antitrust laws shall be construed to forbid the existence and operation of * * * agricultural * * * organizations instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws."

Section 1 of the Capper-Volstead Act provides that "fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: [4665] pro-

vided that such associations are operated for the mutual benefit of the members thereof, as such producers."

I will refer to these two statutes as the statutes relating to marketing associations.

The second cause of action alleges, among other things, that defendants Sunkist and Exchange Orange and alleged co-conspirator Exchange Lemon have a monopoly control over product fruit available for processing in California and Arizona. You are instructed, in this connection, that it is not a violation of the Sherman Act, or any other antitrust act, for co-operatives, such as defendants Sunkist and Exchange Orange and alleged co-conspirator Exchange Lemon—and they are admittedly co-operatives—to acquire or control a large or even 100 per cent of the citrus product fruit grown in California and Arizona, if they do so solely through co-operative or collective action authorized by the statutes relating to marketing associations.

The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage or to destroy a competitor is unlawful

The defendant Sunkist is permitted under the law to acquire a legal monopoly over product Valencia oranges that are available for processing into citrus juice products, including single-strength Valencia juice. Sunkist or Exchange Orange could in 1951 have legally processed all of such [4666] oranges in their own plants into citrus juice prod-

ucts and not made any of them available to independent processors, such as the plaintiff, TreeSweet or Silzle, if they had been able to, and cared to do so. Defendant Exchange Orange, as the processing company for the grower members of Sunkist, could also enter into lawful processing contracts with independent processors to have the oranges of the grower members of Sunkist processed into citrus juices to be thereafter sold by Sunkist as the citrus juice products of its grower members to prospective buyers thereof, including independent processors. However, such contracts must be lawful processing contracts and not devices which are resorted to pursuant to the conspiracy charged to illegally restrain trade, or to illegally monopolize that part of the citrus juice market which is represented by such citrus juices as are processed in California and thereafter sold in interstate commerce. It is for you to decide whether the contracts which Exchange Orange entered into in 1951 with TreeSweet and Silzle, when coupled with any refusal of the defendant Sunkist or Exchange Orange, to make oranges available to the plaintiff under comparable arrangements pursuant to the combination or conspiracy charged, were lawful processing contracts, or whether they were contracts which were made pursuant to the combination or conspiracy charged and had the purpose and effect of restraining and/or monopolizing interstate trade and commerce in the citrus juices and particularly single-strength [4667] Valencia orange juice processed in California and sold in interstate commerce, by eliminating com-

petition between Sunkist and such processors in the interstate market for such products as were processed under such contracts.

Now, so that you will not be confused, let's back up. Here are co-operatives which are permitted to combine together to produce and market their fruit. The antitrust laws say that they may lawfully do that, and the antitrust laws say that they shall not be in violation of any—are you sleepy down there?

Juror Daiker: No.

The Court (Continuing): ——shall not be in violation of any antitrust law in so doing.

The plaintiffs claim that the defendants did actually have a monopoly of product fruit through their co-operatives. The defendants say, "We didn't have it. But, if we did, it was legal." And the court has told you that it was legal. So there is no dispute about that.

As the court has told you, the defendants Sunkist, Orange, and co-conspirator Lemon, could have had 100 per cent monopoly of all the oranges and lemons grown in Southern California, so that isn't our problem. It is what you find happened or did not happen from there on out.

If they had this monopoly control of product oranges, then they could not use it illegally. They could use it legally. [4668] Likewise, the plaintiff contends that the defendants conspired and combined to restrain trade and commerce, and conspired and combined to monopolize the citrus fruit market, which is something different from the product fruit.

The question that is being left to you as jurors is not the question as to whether these co-operatives

could have legally had a monopoly of all the oranges or lemons in California; there is no argument about that; the question on that phase of the case is whether or not, if plaintiff proves they did have such monopoly, did they use it legally or illegally. That is a question of fact. You are the sole judges of the facts.

Sections 1 and 2 of the Sherman Act have both the geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of the things forming a part of interstate commerce. If you find that either or both of the defendants combined with TreeSweet or Silzle to eliminate the competition of the plaintiff in the market for citrus fruit juices, particularly single-strength Valencia juice processed in California and sold in interstate commerce, and that any of the acts charged to have been performed by such defendants were performed in furtherance of such combination or conspiracy, and that the performance of any of such acts was the proximate cause of any damage to the plaintiff, you should [4669] find that there was a violation of the antitrust laws and proximate causation, and you should proceed to the question of damage.

Any combination effectively excluding outsiders from the business altogether is a monopoly and is unconditionally unlawful.

No claim or contention is made herein by the plaintiff that defendants, or either of them, attempted to monopolize.

This may be a technical distinction. There is a charge that they conspired to monopolize. That is different from an attempt to monopolize, to go back to those instructions that I gave you on conspiracy. Attempt to monopolize is something different. For instance, one individual could attempt to monopolize, without any conspiracy. But there is no charge of attempt to monopolize.

In considering the matter of monopoly power two ingredients are of outstanding significance: the power to fix prices and the power to exclude competition.

The words "to fix prices" refer to price fixing activities which tamper with or affect price structures in interstate trade or commerce. [4670]

Whether monopoly power existed in a defendant or defendants, and whether such power was illegally used or misused, is a question of fact for the jury.

Agreements which create potential power for price maintenance exhibited by its actual exertion for that purpose are in themselves unlawful restraints on interstate commerce within the meaning of the Sherman Act.

Any combination which tampers with price structures is engaged in an illegal activity. Even though the members of the price fixing group are in no position to control the market, to the extent that they raise, lower, or stabilize prices, they would be directly interfering with the free play of market forces. The Sherman Act places all such schemes beyond the pale and protects that vital part of an economy against any degree of interference.

If you find that the effect of the action of Exchange Orange Products Company in entering into the 1951 contracts with TreeSweet and Silzle and in refusing to enter into a comparable arrangement with the plaintiff whereby it could have secured oranges or single-strength Valencia orange juice was to exclude the plaintiff as a competitor of Exchange Orange Products Company, TreeSweet and Silzle from a substantial market for [4671] single-strength Valencia orange juice processed in California and sold in interstate commerce, such exclusion would be unreasonable in and of itself, and illegal.

You are to determine whether TreeSweet and Silzle were selling single-strength orange juice in interstate commerce in competition with single-strength orange juice processed by Exchange Orange and sold by Sunkist in interstate commerce. It is illegal per se, that is, it is illegal in itself and in violation of the Sherman Antitrust Law for any two or more competitors to enter into any agreement which fixes or otherwise tampers with the price or price structure at which the products which such companies sell shall be sold in interstate commerce. If, therefore, you find that the 1951 TreeSweet or Silzle contracts had the necessary or intended effect of fixing or tampering with the price or price structure at which Sunkist, TreeSweet or Silzle sold single-strength orange juice in interstate commerce, you may consider such fact in determining whether such contracts were in fact entered into as part of a conspiracy to restrain interstate commerce, or a conspiracy to monopolize or con-

trol the production and sale of California citrus fruit juices in interstate commerce as charged by the plaintiff.

Monopoly power is the power to exclude a competitor [4672] from a market. Such power may, however, be lawfully acquired. If you find that the defendants Sunkist and Exchange Orange Products had such power over product oranges, they could lawfully exercise it in the case before you by deciding to process or retain for their own use all of the product oranges of their grower members. They could even destroy such oranges if they cared to do so. However, if and when Sunkist or Exchange Orange Products offered to make product oranges available to independent processors by sale or under other arrangements and made them available to their competitors such as TreeSweet or Silzle, then Sunkist or Exchange Orange must exercise their monopoly power, if such they possessed, over the product oranges of their grower members in such a manner as not to illegally restrain competition in any citrus fruit juices that may be processed therefrom.

I charge you that even though the defendants Sunkist and Exchange Orange Products might lawfully have a monopoly control over the product oranges available in California for processing into citrus juice products, such control could not be illegally exercised by them or either of them to extend such control over citrus juices processed in California and sold in interstate commerce by illegal means which had the necessary [4673] effect of

eliminating a competitor or eliminating competition in such products as such action would restrain interstate trade and commerce. If, therefore, you find that Sunkist and Exchange Orange Products, or either of them, by the combination or conspiracy charged, were endeavoring to extend their control into such market by making contracts with independent processors, TreeSweet and Silzle, and that as part of such conspiracy and combination they refused to make oranges available to the plaintiff under comparable arrangements, and that such refusal eliminated the plaintiff as a competitor of Sunkist, TreeSweet and Silzle in such market, then you may find that the defendants violated the antitrust laws.

If you find as a fact that the defendants Sunkist and EOP exercised such control over the price and amount of California product Valencia oranges in 1951 that they had the power to determine the price and quantity of Valencia oranges that were available to independent processors in California for making single-strength Valencia juice or other citrus juice products, such power would constitute monopoly power.

If you find that either Sunkist——

Let me stop there. That monopoly power would be legal, monopoly power over the product oranges.

If you find that either Sunkist or EOP or [4674] both together had such power, it would not, however, have been illegally acquired in violation of the antitrust laws as they could legally acquire such power as corporations organized under Federal

and state laws which permit producers of agricultural products such as oranges to combine together in organizations comparable to that of the defendants Sunkist and Exchange Orange Products for the purpose of marketing and processing the products of their members in interstate commerce. Such laws do not, however, permit Sunkist or Exchange Orange Products to combine together with an independent processor such as TreeSweet and Silzle for the purpose of restraining or monopolizing trade and commerce in California citrus juices, such as single-strength Valencia juice or frozen orange concentrates that are processed in California from such oranges and thereafter sold in interstate commerce.

You are instructed that you may not find that defendants Sunkist or Exchange Orange had monopoly control or power over the distribution of products oranges unless you find from the preponderance of the evidence that defendants Sunkist and Exchange Orange, or either of them, had such monopoly control or power as described under the instructions that I have given you.

It is for you to decide whether the [4675] defendants, Sunkist and Exchange Orange or either of them had such power or control over the amount of product oranges that were available in 1951, to independent processors for processing into citrus juice products, that they or either of them were able in fact, to determine the price or terms and conditions at which product oranges would be made

available to independent processors by the defendants and any other actual or potential supplier of product Valencia oranges, for processing into citrus juice products, particularly single-strength Valencia juice processed from product Valencia oranges in California in 1951.

I charge you that the defendant Exchange Orange may legally enter into a processing contract whereby Valencia oranges furnished by Sunkist or Exchange Orange may be processed into single-strength orange juice for Sunkist by an independent processor party to such contract. However, such processing contracts cannot be entered into by Exchange Orange as part of a combination or conspiracy which has the purpose or effect of fixing the prices at which single-strength Valencia juice processed by TreeSweet and Silzle for Exchange Orange may be sold or offered for sale by TreeSweet or Silzle in interstate commerce as such contracts would then be illegal contracts.

In other words, you have got a question of fact there. Were these legal processing contracts or were they [4676] illegal? I am trying to present both sides of the problem to you.

The right of a private business concern to select its customers is neither absolute nor exempt from regulation. Its exercise as a purposeful means of maintaining a monopoly is prohibited by the Sherman Act.

I charge you that the plaintiff need not show by direct evidence that the alleged refusal of the

defendant Exchange Orange to enter into an agreement with plaintiff comparable to that entered into by the Exchange Orange Products Company in 1951 with TreeSweet and Silzle, or to make Valencia oranges available to the plaintiff under terms and conditions comparable to those at which Exchange Orange made Valencia oranges available to TreeSweet and Silzle during the 1951 packing season, was pursuant to the combination or conspiracy charged, and a purpose on the part of Exchange Orange or Sunkist, its parent corporation, to eliminate the competition of the plaintiff in the interstate market for single-strength orange juice or to create or maintain a monopoly over the processing or selling of Valencia single-strength orange juice processed in California and sold in the interstate market as charged in the first and second causes of action.

That's a long one. The gist of it is that plaintiff need not show by direct evidence the things the plaintiff [4677] charges.

Such a combination, conspiracy or purpose frequently cannot be shown by direct evidence, but may be shown by circumstantial evidence and from all just and reasonable inferences which may be drawn therefrom.

However, the plaintiff has the burden to prove such matters by a preponderance of the [4678] evidence.

Exchange Orange would have had a legal right to refuse a contract to plaintiff comparable to the TreeSweet and Silzle contracts unless such refusal was a part of a violation of the antitrust laws.

The first cause of action charges that the defendants Sunkist and Exchange Orange and the alleged co-conspirators, Exchange Lemon, TreeSweet and Silzle, combined and conspired with each other at a date unknown to the plaintiff, and entered into contracts and did certain other things in 1951 with the purpose and effect of unreasonably restraining interstate trade and commerce in canned citrus fruit juices, particularly single-strength Valencia orange juice produced in California and marketed throughout the United States, with the resultant injury and damage to the plaintiff, i.e., that Sunkist and Exchange Orange and the alleged co-conspirators combined and conspired to eliminate the competition of the plaintiff in the interstate market for canned citrus fruit juices and particularly single-strength Valencia orange juice in the year 1951, and performed certain acts pursuant to such combination and conspiracy which proximately caused damage to plaintiff.

Unless you find, therefore, from the preponderance of the evidence, that Sunkist or Exchange Orange or either of them, combined or conspired with either TreeSweet, or Silzle, or ELP, and in 1951 did one or more of the specific acts charged—those are the six acts, one or more of the six [4679] acts—charged in the first cause of action, and that such act or acts had the purpose or necessary effect of damaging or eliminating the competition of plaintiffs in the interstate market for California canned citrus fruit juices or single-strength Va-

lencia orange juice, your verdict must be for the defendants on the first cause of action.

The second cause of action charges that the defendants Sunkist and Exchange Orange and the alleged co-conspirators Exchange Lemon, TreeSweet and Silzle combined and conspired together, and performed the same six acts alleged in the first cause of action, which are incorporated by reference into the second cause, in order to monopolize the production and interstate sale of California citrus fruit juices, especially single-strength Valencia orange juice, and that pursuant to such conspiracy they actually monopolized such production and interstate sale of California citrus fruit juices, and particularly single-strength Valencia orange juice, with resultant injury and damage to plaintiff. Unless you find from the preponderance of the evidence that defendants Sunkist and Exchange Orange, or either of them, and one or more of the alleged co-conspirators, combined and conspired, and pursuant to such combination or conspiracy did one or more of the acts charged, and complained of, in order to acquire effective control of the interstate market for California citrus fruit juices, with the purpose or necessary effect of [4680] eliminating competition, including that of the plaintiff, from such market, your verdict must be for the defendants on the second cause of action.

Those are summary instructions which sort of sum up what is charged and what the plaintiff must prove.

We are getting towards the end.

The plaintiff claims that the six acts complained of were performed, pursuant to a combination or conspiracy to restrain or monopolize interstate commerce, and that it was injured by reason of the performance of one or more of these acts. You are, therefore, to determine from the preponderance of the evidence whether these acts, or any one or more of them, were performed pursuant to the combination or conspiracy charged in this case, and with the purpose or the necessary effect of eliminating the competition of the plaintiff in the market for citrus fruit juices processed in California and sold in interstate commerce.

Here are some miscellaneous instructions. We are going on to another subject.

The court believes it is its duty to inform you of the legal effect of Exhibit 84-A, which concerns the reorganization proceedings in 1948 and 1949. Exhibit 84-A was the large photostatic exhibit substituted for an abbreviated one which we originally called 84. Exhibit 84-A consists of a petition by Winckler & Smith to present a third [4681] modified arrangement, and the third modified arrangement itself, and an order approving it.

The purpose of Chapter XI proceedings is to permit a debtor to propose a plan of arrangement. If the plan of arrangement is approved, the debtor's business and property then passes from the possession of the Receiver—and from the control of the Bankruptcy Court—back to the corporation itself.

Winckler & Smith was the debtor from the time of the beginning of the proceedings under Chapter XI, and Lynch was the Receiver for Winckler & Smith from a date some time thereafter and until the approval of the third modified arrangement. During this time the Bankruptcy Court controlled the title and possession of Winckler & Smith's business and property through its powers and from the date of the appointment of Lynch as Receiver, through its receiver.

So on February 14, 1949, Exhibit 84-A, this third plan of arrangement and order of the Bankruptcy Court approving it, were filed.

Incidentally, when you look at that petition you will find that it is the complete plan. It classifies the creditors which get 100 per cent, and those which just get a few cents on the dollar, and so forth. It was the plan that was submitted. And then the order of the Bankruptcy Court, Referee Head approving it. [4682]

Both the plan and the order referred to an escrow wherein the real property and the plant of Winckler & Smith were being sold to Rubin and $40,000 was to go from the escrow to the Receiver Lynch, to be paid to creditors; and referred to a second escrow where other moneys were on deposit to be paid to Lynch, the Receiver, to reimburse him for certain expenses from December 14, 1948, to the date of the close of escrow wherein the money was deposited.

Why that only concerned the period from Decem-

ber 14, '48, to the close of the escrow I don't know. I don't think it is important. At least, that is what the documents talk about.

To get everything accomplished, that is, to get the $40,000 from one escrow to the Receiver, and to get the money from the other escrow to the Receiver, to get a clear title, subject to the RFC loan, to Rubin, to get the hold of the Bankruptcy Court under Chapter XI released from the real property so that the $40,000 escrow could be closed —to get all these things done, the court made its approval of the third plan conditional. That is, provided that the order would be set aside, unless the things above were all done within a fixed time. These things were actually done, so the order of approval was never set aside.

The Court, therefore, instructs you, as a matter of law, that the sale of the real property and the plant to Rubin, [4683] and the receipt of $40,000 from the escrow by the Receiver, was a part of the Chapter XI proceedings; and, further, that regardless of when the deed to Rubin was delivered, its effect related back to February 14, 1949, the date of the approval of the plan and the date of the release of Winckler & Smith from the Chapter XI proceedings.

It follows, also, as a matter of law, and the court instructs you that for accounting purposes the sale of the real property and plant by Winckler & Smith should be considered as occurring during the Chapter XI proceedings and not during that por-

tion of Winckler & Smith's fiscal year which occurred after the reorganization proceedings under Chapter XI.

The loss of $169,000 or $170,000 resulting from the sale of the real estate and plant referred to in the evidence should not have been taken into account during Winckler & Smith's fiscal year ending January 31, 1950, and Mr. Lynch, the expert witness for the defendants, should not have so considered it, and the court was in error in permitting him to do so in his computations.

Now, the reason for that is this: While a company is in reorganziation under bankruptcy, it does not have either title or possession of its property. A separate legal entity has it. Maybe the debtor in possession may start out under an order of the court as debtor in possession, and then later [4684] a receiver will be appointed. Sometimes a receiver is appointed immediately that the debtor in possession files. But during that time the title is controlled by the Bankruptcy Court, possession is controlled. Therefore, what happened during the period from the time it goes into bankruptcy or reorganization, until it comes out, is not a part of the operation of the company.

Now, for tax purposes you may have other problems. I don't know.

But this has been an issue in the case, and I felt it was my duty to instruct you.

If I am wrong in this, the defendants aren't hurt, because then they have error. But I have looked it

over, and I have decided that I shouldn't let you, as laymen, flounder through petitions and orders and try to decide what they meant. I have told you, therefore, what as a matter of law they mean.

There have been offered in evidence certain letters from brokers, allegedly making complaints to plaintiff about products. These letters were admitted into evidence solely for the purpose of impeachment of the testimony of Winckler concerning complaints, and are not to be considered by you as any evidence of the truth or falsity of the alleged facts contained therein. To be considered in this latter manner they would violate the hearsay rule, and if the truth of falsity [4685] of such alleged complaints were to be considered by you, the brokers or the writers of the letters themselves would have to be called as witnesses before this court.

Letters written by the plaintiff, Winckler & Smith, or its agents, and so-called anagrams, were admitted into evidence for the purpose of showing admissions against interest, if any, on the part of the plaintiff.

You are instructed that the plaintiffs have offered financial statements and opinion testimony on the question of damage, and the defendants have offered opinion testimony concerning the financial statements of the plaintiff, also on the question of damage and causation. This testimony was admitted and may be considered by you on the question of damage, that is, what damage, if any, did the defendants cause to Winckler & Smith in 1951, and may also be considered on the question of causation, that

is, whether the acts of the defendants in 1951 caused or contributed to the failure of Winckler & Smith or to its damage or injury, if any. [4686]

The refusal to EOP, if such you find, to give a contract to plaintiff similar to the Silzle and Tree-Sweet contracts must be judged on the basis of the evidence and instructions in this case and upon such knowledge and information as EOP and its officers, agents and employees had at the time of such refusal, if any, and not upon the basis of facts or information thereafter discovered or ascertained by EOP.

The law provides in part, the antitrust laws:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover * * * the damages by him sustained * * *"

If the plaintiff is entitled to recover, your interest will be solely with respect to actual damages, and that only in the event that you shall first find under the law and facts that the plaintiffs are entitled to a recovery.

A tort feasor, wrongdoer, is liable for all consequences naturally resulting, all injuries [4687] actually flowing from his wrongful act, whether in fact anticipated or contemplated by him when his tortious act was committed. If plaintiff is entitled to damage then recoverable damages include com-

pensation for all injury to plaintiff's business arising from wrongful acts committed by defendant or defendants provided such injury was the natural and proximate result of the wrongful acts. This includes injury to business standing or good will, loss of business, additional expenses incurred because of the tort and all other elements of injury to the business. When determined by the trier of the facts, their propriety cannot be governed or measured by any precise yardstick. They must bear some reasonable relationship to the injury inflicted and the amount must rest largely in the discretion of the trier of facts.

But even where one who has violated the antitrust laws has by his wrong prevented a precise computation of damages, the jury may not render a verdict based on speculation or guesswork. It may make a just and reasonable estimate of the damages based on relevant data and render its verdict accordingly.

If you as jurors, based on all the evidence and instructions in this case should determine that plaintiff's business or property was injured and that the defendants or either of them is liable therefor the question will [4688] arise as to how plaintiff's damages should be computed. Since proof of the damages suffered may be difficult, a wrongdoer may not object to the plaintiff's reasonable estimate of the cause of the injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoers' misconduct has rendered unavailable. The most elementary con-

ceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

Upon the question of claimed loss of earnings, you may consider the evidence in respect to plaintiff's earnings since the time of its incorporation, and whether plaintiff operated at a profit or loss during the period from its incorporation.

I charge you that the law permits you to take into account both the damages, if any, which are inflicted on existing property and damages, if any, which were sustained by being unable to make profits which reasonably could be anticipated and would have been realized had it not been for the wrongdoing of the defendants, if such you find.

If you find that neither of the defendants has violated the antitrust laws, it will be unnecessary for you to consider whether any acts of the defendants injured [4689] the plaintiff. If you find that the defendants, or either of them, have violated the antitrust laws, you will then have to consider under all the evidence in the case whether or not any of the acts complained of as part of the combination or conspiracy charged were the proximate cause of injury to the plaintiff. The fact that the plaintiff may have lost a substantial sum of money or suffered a business failure in 1951 does not by itself prove that such loss or failure was caused by any illegal act of the defendants. Before you can return a verdict for the plaintiff, you must find not only that either or both of the defendants have

violated the antitrust laws but that one or more of the specific acts complained of under all the evidence in the case was the proximate cause of injury to the plaintiff. If you find that plaintiff's loss or business failure in 1951 resulted not from any violation of the antitrust laws and not from one or more of the acts complained of but from some other proximate cause or causes, then the acts of the defendants relied upon by the plaintiff in this case would not have been the proximate cause of an injury to the plaintiff, and your verdict should be for the defendants.

I call your attention in this connection to the general instructions on proximate cause, that there may [4690] be two or more proximate causes or forces contributing to injury or damage, and if the defendant's act is one of those proximate causes, defendant is liable. If some other force, which I called another or superseding force comes in and becomes the sole cause of injury, the defendants, even if the other things are proved, are relieved from liability because that new sole cause then becomes the cause of the damages.

Damages must be reasonable. In the event that your verdict is for the plaintiff you may award them only such damages as will fairly and reasonably compensate them for the injuries or damages which you believe from a preponderance of the evidence they have sustained as a proximate result of the acts complained of.

You are not permitted to award any party speculative damages. This means you are not to include

in any verdict compensation for prospective loss which, although possible, is remote or conjectural.

If you find from the evidence that the plaintiff is entitled to a verdict, you must not, in ascertaining the amount, resort to the pooling plan or scheme which has sometimes been adopted by juries for fixing such amount. That plan or scheme is where each juror writes the amount to which he considers the plaintiff is entitled, and the amounts so written are added together [4691] and the total is divided by twelve. This is a scheme of chance and no element of chance may enter into your verdict or into the determination of any question necessary thereto.

I have told you about that nefarious scheme. I have told you that it is not to be used if you reach that part of the case.

The law of the United States permits the judge to comment to the jury on the evidence in the case. I do not think I have commented on the evidence. If you find any such comment, you may disregard it. Such comments are only expressions of the judge's opinion as to the facts; and the jury may disregard them entirely, since the jurors are the sole judges of the facts.

During the course of a trial, I occasionally ask questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you, as jurors, are at liberty to disregard all

comments of the court in arriving at your own findings as to the facts.

The fact that I have instructed you as to the measure of damages in this case should not be considered as intimating any view of mine as to which party [4692] is entitled to your verdict. Instructions as to the measure of damages are intended for your guidance in the event you find from the evidence in favor of the plaintiff.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

The attitude of jurors at the outset of their deliberations is important. It is seldom helful for a juror, upon entering the jury room, to announce an emphatic opinion on the case or a determination to stand for a certain verdict. When a juror does that at the [4693] outset, individual pride may become involved, and the juror may later hesitate

to recede from an announced position even when shown it is incorrect. You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth. You will make a worthwhile contribution to the administration of justice if you arrive at an impartial verdict in this case.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by the bailiff. But bear in mind you are not to reveal to the court or to any person how the jury stands, numerically or otherwise, until you have reached an unanimous verdict.

You can't send down a note saying we stand 10 to 2, what do we do? Or you can't send down one saying, "We favor the defendant" or "the plaintiff."

You can send down notes, if you have to, where you ask particular questions, or on reasonable problems, but don't tell us how you stand.

Upon retiring to the jury room, you will select one of your number to act as foreman. The foreman will preside over your deliberations and will be your spokesman in court.

Forms of verdict have been prepared for your convenience. [4694]

If you agree upon a verdict, we have two forms of verdict, one for the plaintiff and one for the defendant. The plaintiff's verdict reads:

"We, the jury in the above-entitled cause, find in favor of the plaintiffs, Winckler & Smith Citrus Products Company, a corporation, and Ronald M.

Walker, as Trustee, and against the defendants, Sunkist Growers, Inc., a corporation, and the Exchange Orange Products Company, a corporation, and assess the damages in the sum of ....."

Place for signature and for date.

Now, if you find that one defendant is liable and not the other, you may cross up this verdict.

The second verdict reads:

"We, the jury in the above-entitled cause, find in favor of the defendants, Sunkist Growers, Inc., a corporation, and the Exchange Orange Products Co., a corporation, and against the plaintiffs, Winckler & Smith Citrus Products Co., a corporation, and Ronald M. Walker, as Trustee,"

with a blank for the date and place for the foreman's signature.

You are to take these forms to the jury room, and when you have reached unanimous agreement as to your verdict, you will have your foreman fill in, date and sign [4695] the form which sets forth the verdict upon which you agree; and then you will return with your verdict to the courtroom. [4696]

* * *

(The following proceedings were had at the bench outside the hearing of the jury:)

The Court: First, let me say that there will be incorporated herein, by reference, all objections and arguments that were made at the time that we settled the instructions.

Now, does plaintiff have any further objections?

Mr. Dixon: Your Honor, I think these were words of omission. I think you stated, if I got your charge correctly, "defendants combined or conspired to monopolize the citrus fruit market." It is the citrus fruit juice market.

The Court: All right.

Mr. Dixon: Then, second, you said that defendants monopolized the market for citrus juices. In other words, it is the citrus juices processed in California. It appears in other parts, but standing alone——

The Court: It has to be read together.

Mr. Dixon: In one place you said that a legal monopoly may become illegal.

I don't know whether you had "a legal monopoly may be used to accomplish an illegal purpose."

The Court: Yes.

May I see those?

Mr. Dixon: Yes; those are the only three (handing paper to the court).

The Court: All right. Now, does the defendant have [4697] additional objections?

Mr. Fisher: I think on two occasions you suggested during the instructions that the defendants monopolized the market for citrus fruit juices.

The Court: For citrus fruit juices, or citrus fruit products?

Mr. Fisher: Citrus fruit juices. The charge is not that the defendants did this, but that there was a conspiracy, and a successful conspiracy to monopolize.

Mr. Dixon: Citrus fruit juices processed in California.

Mr. Fisher: And that conspiracy was with Tree-Sweet and Silzle and ELP.

And then on occasion I think you stated that the defendants were charged with conspiracy to restrain trade.

And, again, the conspiracy alleged is a conspiracy of the five, that is to say, with TreeSweet, Silzle, ELP——

The Court: Do you want me to straighten some of these things out, or are you objecting to the instructions that I gave, or what?

Mr. Fisher: Objecting to the instructions which were given, your Honor.

The Court: Are these things that were read out of the instructions, or were they matters that I interpolated to the jury.

Mr. Fisher: I think they were in matters that were interpolated [4698] to the jury.

That, again, occurred when you were stating that there was no charge of attempt to monopolize. You said that the defendants conspired to monopolize. The same matter occurred. There was not the reference to conspiracy or alleged conspiracy with Tree-Sweet, Silzle, or ELP.

The Court: What is your first point, again? That I referred to monopolization—what is your point on that?

Mr. Fisher: It related only to the two defendants, rather than mentioning the three others.

I think your Honor referred to citrus juices, as

referring to natural and frozen. Of course, it would also include hot concentrate.

Mr. Williams: Three types; hot concentrate, the frozen, and single-strength, are all included in the complaint.

The Court: I read that right off of the instruction. I took the definition out of the complaint, but I will correct it if there is a mistake.

Citrus juices refers to what?

Mr. Williams: Single-strength, frozen concentrate, and hot pasteurized concentrate.

The Court: I think it said "natural and concentrated juices."

Mr. Williams: Natural and frozen, as I recall it.

The Court: There are three kinds, single-strength, hot [4699] concentrate and frozen concentrate. All right.

Anything else?

Mr. Dixon: I would say the products involved in the conspiracy charged are those products, particularly single-strength Valencia orange juice. I think if they are going to ask for a special definition now of the products, which is already covered in the general charge, that it ought to be——

The Court: Anything further?

Mr. Fisher: I would also like to object to the interpolations, particularly with reference to the charge with reference to Exhibit 84-A. It seemed to me that they were not necessary and were contained in the charge as originally prepared, concerning which we objected.

The Court: The objection is overruled. All your

objections incorporated by reference are overruled on both sides.

(Whereupon the proceedings were resumed in open court within the hearing of the jury, as follows:)

The Court: Ladies and gentlemen, in the charge that I have given you, when I was speaking extemporaneously and not from my notes, I may have been a little sloppy in some of the things that I said in trying to describe or explain these things to you.

You could tell from my reading, and talking, when I was reading and when I was talking. I would suggest that you be [4700] controlled by the things that I read to you, and that the things I spoke to you extemporaneously be merely to assist in understanding it.

For instance, I may have stated some things that weren't quite accurate. I talked about a legal monopoly, and may have said that a legal monopoly may become illegal. But that is not correct. A legal monopoly would still be legal, but it might become usable for an illegal purpose. A legal monopoly would still be good for those purposes that it should be used for.

I don't think you are confused about that. [4701]

I also made some reference to defendants combined and conspired to, an allegation that the defendants combined and conspired to monopolize citrus fruit market. If I said market, I meant citrus fruit juices processed in California and sold in inter-

state commerce. That is the phrase I tried to use throughout here.

I also apparently erroneously talked about the charge was that the defendants had actually monopolized. The charge is that the defendants and the co-conspirators had monopolized, they succeeded in their conspiracy and had accomplished monopolization. In other words, the co-conspirators are named in there. It does not involve solely the two defendants.

I also am told that I spoke about how the defendants had conspired on one occasion. The charge is not that the defendants conspired. The charge is that the defendants and co-conspirators conspired.

However, as a matter of fact, you may find that nobody conspired, or you may pick out and decide that some number less than the total conspired. It is your task to decide the facts.

Also, I talked about some definition of citrus fruit juices, and if I was erroneous in that respect, let me advise you that there are just three citrus fruit juice products that are involved, single-strength juice, frozen [4702] concentrate and hot concentrate. I think you are all familiar with that from the evidence.

Now, do you want to come back up again, or are you content? Is that satisfactory?

Mr. Fisher: I think we are content.

The Court: Satisfactory, Mr. Dixon?

Mr. Dixon: Satisfactory.

The Court: I think the safest thing for you to do is to realize that those instructions that I read to

you are the ones we worked on and they are written with more precision.

Before the bailiffs are sworn, let me say one thing more. It has been a long case. The case is important to the plaintiff and the case is important to the defendants. There is a lot of evidence here. You are supposed to elect a foreman, and you will find if you elect a foreman and conform with the rules of parliamentary order, if you can, you will get along a lot better, if you have some order in your deliberations and you don't all talk at one time. Go around and give everybody a chance to be heard. That is just a matter of your own internal organization. You can do what you want.

I don't think you should approach the matter hurriedly. We will leave it to you when you want to adjust your hours of eating and working. You can proceed to work as [4703] long as you want this afternoon, or you can go to dinner and then come back and work some after dinner. You decide when you want to go to bed. Decide what time you want to come back tomorrow and work. You work those things out with the bailiff. Write your own ticket. But you have got a job on your hands.

I have been very much impressed by this jury and I think you will go about it diligently and intelligently.

All right, Mr. Clerk, swear the bailiffs. [4704]

* * *

The Court: The jury may now retire in the custody of the bailiffs to consider your verdict. But not the alternates.

(Whereupon, the jury retired from the court room and the following proceedings were had in the absence of the jury:) [4706]

* * *

(Whereupon, the jury returned to the court-room and the following proceedings were had in the presence of the jury:)

The Court: The record will show the jury present in their proper places. Counsel present. [4713]

* * *

Juror Berger: May I ask the judge to explain to us again the six stipulations on the antitrust laws, and the six you told us about, monopolies, yesterday? There seems to be a bit of confusion on that.

The Court: Well, I think I know what you mean, although you haven't worded your question artfully.

Juror Berger: Under Sections 1 and 2 of the antitrust law. You gave us six counts by which we could determine, the contentions of antitrust.

The Court: I think I know what you mean. I think I can do this orally if nobody objects, and then I will give you a chance to make your objections in the absence of the jury.

There is a charge of a violation of the antitrust laws in this case, but the burden is on the plaintiff to go further than merely to show a violation of the antitrust laws. Plaintiff must show that its damage came from one or more of six particular acts or things which were complained of.

Those were the six things which I spoke of as being the acts complained of, things complained of.

Maybe I had better get my file.

(Addressing the bailiff.)

My instruction file is laying right on my desk. Bring it in. [4717]

The burden is, therefore, on the plaintiff to prove that damage, injury to the plaintiff, resulted from the violation of the antitrust laws, and from one or more of these six specific acts that were referred to. We call them "acts." Some of them were contracts, but we spoke of them as the acts alleged or the acts complained of. [4718]

These six items were as follows:

One was the alleged oral contract between Orange and Lemon under which it was alleged that Lemon processed oranges for Orange during 1951.

The second was the alleged oral contract between Orange and Lemon whereby it was alleged that Orange processed Lemons for Lemon during 1951.

The third was the allegation that Sunkist and Orange agreed to establish and maintain the price to independent producers like the plaintiff of product oranges, and the allegation that the price made it impossible for independent processors such as plaintiff to acquire product oranges from Exchange Orange or any other source at a price or under an arrangement enabling plaintiff or other independent processors to compete with the defendants Tree-Sweet and Silzle—with the defendants and Tree-Sweet and Silzle.

Four was the contract between Exchange Orange and TreeSweet in 1951.

Five was the contract between Exchange Orange and Silzle in 1951.

Six summarized was the allegation that Orange refused to give plaintiff on request a similar contract.

Are those the six things you are talking about?

Juror Berger: Yes, sir.

The Court: Will counsel approach the [4719] bench?

(The following proceedings were had at the bench outside the hearing of the jury:)

The Court: Any objection by the plaintiff to what I have said to the jury?

Mr. Dixon: No; there isn't, your Honor. It is a restatement.

The Court: Is there an objection by the defendant?

Mr. Strachan: Yes. I think it has a prejudicial effect in that it highlights the allegations of the complaint and it repeats out of context and out of reference to the other instructions a particular instruction. I don't know that there is any way of curing it now, but I do think it is prejudicial, your Honor.

The Court: They asked for a specific thing.

Mr. Strachan: That's right.

The Court: And I tried to limit myself to what they asked for. I told them also, in addition to what they asked, the plaintiff must prove violation of the

antitrust laws and must prove one or more of these acts, so your objection is overruled.

Mr. Strachan: There is this other aspect, the instruction is out of context with the instruction on conspiracy.

The Court: I will again advise the jury when you leave the bench that all instructions must be considered together and they must not look to one instruction alone as the law. [4720] I will remind them of that instruction.

(The following proceedings were had in open court in the hearing and presence of the jury:)

The Court: I have only one other thing I want to say to you, and that is, the instruction given you before, that you must treat all instructions as a whole and not single out any one of them, and any one you are considering you must consider in connection with all the other instructions.

All right. You will now be excused to continue with your deliberations.

The court will remain in session.

(The jury left the courtroom and the following proceedings were then had outside the hearing and presence of the jury:) [4721]

* * *

(The jury returned to the courtroom at 9:35 o'clock, p.m.)

The Court: The record will show the jury is present and in their proper places.

Mr. Foreman, have you arrived at a verdict?

The Foreman: We have, your Honor.

The Court: Will you hand it to the bailiff.

The clerk will read the verdict.

The Clerk: "United States District Court, Southern District of California, Central Division.

"Winckler & Smith Citrus Products Co., et al., Plaintiffs, vs. Sunkist Growers, Inc., et al., Defendants.

"No. 13788-C Civil.

"Verdict of the Jury.

"We, the jury in the above-entitled cause, find in favor of the Plaintiffs, Winckler & Smith Citrus Products Co., a corporation, and Ronald Walker, as Trustee, and against the Defendants, Sunkist Growers, Inc., a corporation, and The Exchange [4724] Orange Products Co., a corporation, and assess the damages in the sum of Five hundred thousand and no/100 Dollars ($500,000.00).

"Dated: Los Angeles, Calif., February 10th, 1956.

"/s/ JOSEPH C. BERGER,

"Foreman of the Jury."

* * *

The Court: Ladies and gentlemen of the jury, before we [4726] proceed any further, I am going to excuse you and thank you for your work. I think you have reached a fair verdict. I will tell you now that your work is concluded that I have been discussing a question with counsel. I have a question before me as a judge which was not before you, as to whether a restraining order should be granted as prayed for in the complaint. That is a matter in

equity, it is not a matter for your consideration but is a matter for my consideration. I think your verdict has been a fair one. [4727]

* * *

The Court: I want the jury verdict filed, but the judgment cannot be entered until we do these other things.

I have looked upon this as a dangerous case. I think I mentioned $25,000 or $500,000 or $600.000 might result. The jury has been, I shouldn't say generous, but the jury has taken plaintiffs' view of their damages. And maybe I should not do this, but I am inclined to think that rather than raise questions on the amount of the TreeSweet settlement, which would be a relatively small settlement, that I would take defendants' view on it and deduct the treble damages. That would be an easy way out of that one.

Mr. Dixon: That would certainly solve the problem. I mean, that would take care of that part of it.

The Court: The matter of further considering the entry of judgment and the hearing on attorneys' fees, the hearing on the question of equitable relief prayed for in the complaint, all other loose ends of the case, will be continued to Monday afternoon at 2:00 o'clock. [4732]

* * *

Monday, February 13, 1956, 2:00 P.M.

The Clerk: No. 13788-C Civil, Winckler & Smith Citrus Products Company vs. Sunkist, et al. Further trial. Hearing on allowance of attorneys' fees and

further proceedings relative to entry of [4736] judgment.

* * *

The Court: I will continue the matter concerning attorneys' fees to the 24th, then, at 10:00 o'clock. And continue, also, until that time the question of the prayer for equitable relief and further proceedings on that, with an understanding that we can't do it that day, but merely to keep it on our calendar to see whether or not we are going to do anything about it, or whether we set some further day for hearing.

Mr. Fisher: Then, as I understand it, the matter of the prayer for equitable relief wouldn't be heard that day, but you are simply continuing it to that date?

The Court: That's right.

However, I want you both to give some attention to this matter for equitable relief, and if the plaintiff is going to press it, I want a memorandum on it; and if the defendant is going to oppose it, I want a memorandum on it, which can be done very promptly. And on the 24th, although we will not get to it, my calendar is such that if I get some days open, and if we decide to go ahead with it, we are going to go into it right [4752] away. In other words, the following week, beginning the 28th, if, for instance, I could get time available, we might proceed immediately into it on the 28th. So you have to just hold yourselves ready to see what date we can get. In other words, I am continuing the matter for what amounts to almost two weeks, ten days

here, to give you a chance to look into this. I think the plaintiff should—today is the 13th, I think the plaintiff by Thursday, the 16th, should file a memorandum (1) indicating whether they are going to press for this relief, and (2), if they are, their views and the law on additional issues that should be tried. And, thirdly, their summary, which doesn't have to be lengthy, of the reason why the relief should be granted.

And the defendants should by the following Wednesday, that is, February 22nd, if the plaintiff says it is still interested in this relief, then address themselves to the two matters which I asked the plaintiffs to address themselves to. What other evidence must necessarily be considered, and in the case of the defendants, why the relief should not be granted, and a summary of your position on the law in that respect, so we will have both of those by the 24th. And, meanwhile, we can be looking, if the plaintiff decides by Thursday of this week that he is going to go ahead on that, we can be looking for time to try out that issue.

Make it the 23rd. The 22nd is a federal holiday. We [4753] didn't get the 12th, but we get the 22nd. So make it the 23rd for the defendants. That is Thursday before the hearing on Friday.

I also would like to explore briefly with you this question of the hearing on attorneys' fees. I just wonder how much expert testimony I ought to listen to in connection with this application. Certainly I am not going to listen to a series of witnesses come

down here and tell me what they think the fees ought to be.

How many witnesses did you have in mind calling?

Mr. Fisher: Your Honor, I frankly hadn't considered it, as yet, as to just how many we might want to have. I would certainly think not more than two or three.

The Court: Do you realize what a hypothetical question you would have to ask a witness in order to get any kind of an opinion from him on this question?

Mr. Fisher: I think I am aware of that; yes.

The Court: Are you prepared to state what the defense of this action has cost the defendants at this time? The plaintiff claims that is a yardstick that could give the court some assistance in passing on fees.

Mr. Fisher: Your Honor, in that respect, I am not, because I, frankly, have not inquired into it. However, I think it is the defendants' position that that is not a factor to be taken into account, as to whether the defendants have overpaid [4754] or underpaid their counsel in the defense of the matter.

The Court: This has been done quite often. Judge Westover has done it. [4755]

* * *

The Court: And I think, further, to resolve this matter of opinion testimony, I don't know how fast you can put an opinion witness on, but we have got one day set aside for this hearing, and I think that

the defendants should limit themselves to not in excess of two hours on this opinion testimony. Not over three witnesses, if you can call three witnesses in two hours on that subject, why, that is all right. But it is going to take you about an hour to ask the hypothetical question, to tell all that has been done in this [4757] case, and then ask what it is worth.

Mr. Dixon: If the court please, we would, of course, prefer not to have to put on opinion evidence in this case. I think your Honor is capable of deciding it, and is certainly familiar with what has been done for the most part in this case, so that it would be repetitious, in a sense, to go into it. But if the defendants are going to confront us with expert testimony, we don't want to be standing alone in the cold without at least comparable testimony, to the extent that your Honor wants to hear it.

The Court: I have indicated already that it is only opinion testimony. I certainly am not bound by it.

I have been trying to throw some cold water on the idea. But do I have a right to say to the defendants that they cannot put it on?

Mr. Dixon: Oh, no; of course not.

The Court: I certainly think you have got to take into account that I sat through this case and know something about it; and, secondly, that anything this witness testifies to is opinion, opinion testimony.

If that is all there is in the record, I doubt if any court would say that I was bound by the opinion of that expert, if the plaintiff never put an iota of evi-

dence on. There are numerous cases to the effect that the judge who tries a lawsuit is a lawyer and has a knowledge of what went on in the [4758] case, and what he saw and observed and what he knows about the case is the basis for the fixing of attorneys' fees; and I would think that the law would be if the plaintiff merely said, "I submit our application on the basis of what you know about the case," and the defendants called three or four experts who gave opinions and who were not cross-examined, I don't think I would be bound to be governed by the opinion of those experts.

Do you think I would be, Mr. Strachan?

Mr. Strachan: I think you would be required to weigh that evidence, and the question of weight would be something——

The Court: Suppose I weighed it and disagreed with it, would that be error?

Mr. Strachan: I think it would depend, in part, upon the extent to which you disregarded it.

I would be disposed to leave the matter as to whether or not it was error to a higher court. [4759]

* * *

HEARING RE ATTORNEYS' FEES

The Clerk: No. 13788-C Civil, Winckler & Smith vs. Sunkist. Hearing motions of the defendants to set aside the verdict and enter judgment for defendants; and further trial on the issues of injunctive relief, allowance of plaintiffs' attorneys' fees, and further proceedings relative to the entry of judgment upon the verdict.

Mr. Dixon: Ready for the plaintiff.

Mr. Fisher: Ready for the defendants.

The Court: I suppose we should take up first this motion the defendants have made.

I have read the motion and the grounds of it, and looked over the memorandum of authorities, and it is my recollection that there is nothing new in this motion. Most of the cases are cases which we discussed before, with the possible exception of points 5 and 6 in the memorandum.

I think we have covered most of it.

Mr. Fisher: Your Honor, so far as the defendants are concerned, I think your Honor is correct. We are willing to submit it and would ask that the previous motions be incorporated. We are willing to submit it on the defendants' motion for a directed verdict filed January 17, 1956, and the argument made by Mr. Williams in support thereof at the close [4764] of the plaintiff's case. That argument appears in the reporter's transcript at pages 2281 to 2380. And upon the defendants' motion for directed verdict made at the close of the case on February 2, 1956. And that argument appears in the reporter's transcript at 3865 to 3898.

You will recall that with respect to that latter motion there was incorporated by reference the arguments which were made on the previous motion, which had been at the close of the plaintiff's case. And upon our motion filed herein and the memorandum of points and authorities in support of it.

The Court: The matters referred to by counsel may be incorporated by reference. I see no new

problems, and my ruling, therefore, will be the same as heretofore. The motion is denied. [4765]

* * *

The order of the court will be that that part of the case involving equitable relief, and the prayer therefor, may go off calendar, without prejudice to either party taking such steps as it sees fit. Without prejudice to the right of the plaintiff to ask for a hearing on that subject, and without prejudice on the part of the defendant to move to dismiss that part of the case, or to ask for a hearing [4769] on it.

* * *

I am going to decide that the TreeSweet settlement is to be deducted from the amount of the judgment to be entered, from the amount of the verdict trebled. In other words, the $2,500 will be deducted from the trebled amount. You can include that in the form of judgment that will be prepared. [4773]

* * *

The Court: Let's pass for the moment this question of allocation, which my present view is shouldn't be made here, and let's proceed to the question of what is a reasonable attorneys' fee for plaintiffs' and the trustee's attorneys in this proceeding.

Mr. Dixon: May it please the court, on this application, and as part of the evidence on which we will rely, I would like to ask counsel for the defendants, as previously requested, to indicate for

the record at this time the total amount of attorneys' fees paid, and/or billed and not paid, or to be billed to the defendants if not already billed, for services rendered by the various counsel for the defendants in this case to the defendants.

As your Honor is well aware, this has been in many respects a most difficult and a most unusual case. In considering the application now before your Honor, it seems to me that is one of the bits of evidence which are properly a part of the record in considering this question, on a comparative basis, and to indicate the extent of work done by the defendants in this case, which, of course, had to be met by the plaintiff, in not only preparing this case for trial, [4779] but also in trying it, and should be before your Honor for consideration on this application. I would, therefore, like to ask counsel for the defendants to submit the information requested, which they informed us they would do, rather than have the records subpoenaed for this purpose.

The Court: Before I hear from you, Mr. Fisher, the defendants have filed, in my opinion, a very excellent memorandum on this matter of attorneys' fees, and they list on page 9 the factors which in their opinion are proper to be considered, and it continues on to page 10, and then on page 10 the factors which should not be considered. The factors listed as proper by the defendants are: (1) The time and labor which has been fairly and properly expended in the case.

(2) The novelty and difficulty of the questions

presented and the quality of skill demanded in the case.

(3) The skill employed by counsel.

(4) The amount involved as it reflects the risk of the client and the commensurate responsibility of the lawyer.

(5) The result achieved.

(6) The eminence, ability and standing of the counsel.

(7) The testimony of experts.

Then there is listed, "The factors which are not to be taken into consideration in determining what is a reasonable fee are the following:" [4780]

(1) The ability of the defendants to pay.

(2) The financial condition of the plaintiff.

(3) Uncertainty of the fee.

(4) Punitive damages resulting from trebling the verdict. And,

(5) Fees paid to defendants' attorneys.

As I studied this over, I am generally in accord—"generally," which would leave some room for minor disagreement—generally in accord with all except the last item, that is, fees paid to defendants' attorneys.

There is little law on that subject, but to give you something to direct your attention to, it seems to me that there is a lot of logic in letting that matter be considered.

If it is proper to consider the novelty and difficulty of the questions presented, in other words, the type of case, the magnitude of the case, the length of time it took to try it, various factors of

that sort, now, what would be a better—not as a complete yardstick standing by itself, but what would be a better factor to take into account, along with all the other factors, than what the defendants themselves thought about this case? Did they consider it some simple little case where they could give a man a $10,000 retainer and give him $100 a day in court and say that is all that we think this case is worth? Or did they consider it a case of such magnitude that they had secured eminent counsel of ability [4781] and standing? Did they pay substantial fees to these attorneys that represented them?

Since we don't have much authority on this problem, you have to approach it from the standpoint of logic. It seems to me that that follows.

Mr. Fisher: Your Honor, we object. I am prepared, if your Honor rules that we have to disclose it, we are prepared to do it, but we do not believe that it is a factor.

We cited the two cases where it was held not to be a factor. Counsel for the defendants might have been underpaid or overpaid, and that is not a factor in determining the reasonable value of the plaintiffs' attorneys' services.

That is what is before the court. What might have been paid by the defendants to their counsel I think is no concern of the court's. It is not a factor to be considered. They might have been doing it for nothing, they might have been doing it for a very high fee. It doesn't seem to me that it is a factor which should be considered by the court.

The Court: I certainly think it is not conclusive, and I certainly think if I heard what was paid to defense lawyers I would have a right, in having sat in this case, to determine whether they were under or overpaid in my mental calculations in making some decision. In other words, supposing I found, which I know will not be true, that these defense lawyers got $1,000,000 for defending this case, I would draw [4782] a mental conclusion that they had been overpaid, but I would also draw a further inference, that probably the defendants had thought this was a very important case, in which they required excellent lawyers, or they wouldn't have paid a million dollars. In other words, I don't think that the matter is conclusive, nor is it a matter of laying down plaintiff's request alongside of what defendants' attorneys were paid, but I think it is a factor in assisting the court in evaluating the difficulty and the importance and so forth in this lawsuit.

Mr. Fisher: I think, your Honor, the very nature of the case, the very complaint, makes it obvious that the defendants would feel that it is an important case and had to be defended. What the defendants' attorneys might have been paid for their services in the case, I think, has no bearing on the issues of this case.

The Court: Of course, your opposition to the amount of attorneys' fees for the plaintiff is predicated, in part, upon the fact that this case in your opinion was not a case that involved any particularly novel factors, or if they were at all novel they

could be easily solved, and that counsel for the plaintiff were not particularly eminent or skilled counsel, although you concede that they did a pretty good job. You have issues in here that I think this matter would have some bearing on. I will overrule the objection. [4783]

I understand, also, that there may be amounts paid to different parties. For instance, Exchange Orange started in this case, went out of the case as a defendant——

Mr. Dixon: You mean Exchange Lemon, your Honor.

The Court: Exchange Lemon—that the Stark firm was originally in the case only for Lemon, and later was in the case for Orange and Sunkist. But I think all those facts should be brought out for what they are worth in the general appraisal of this case.

Mr. Fisher: If your Honor please, answering the court's requirement, and which I take it is that we disclose the amounts which have been paid by defendants Exchange Orange Products and by Sunkist Growers, Inc., to counsel, from the inception of the matter to the end of the trial, we may say in that regard that there are certain unbilled matters covering some of the period of the trial and we have estimated those, and according to our best estimate on the amounts paid and to be paid it would be approximately $160,000 to all counsel.

The Court: That is for EOP and Sunkist?

Mr. Fisher: That is correct.

The Court: Can you break down the amount paid and the amount estimated, roughly?

Mr. Fisher: I can give that to you exactly. It will take a little computation, your Honor. Just a moment. [4784]

Mr. Fowle: I take it, your Honor, that our objection may be a continuing one so we don't need to renew it?

The Court: It may be a continuing objection to the entire line of questioning.

I also understand from our previous discussions that Mr. Dixon is content to accept the word of counsel on these matters.

Mr. Dixon: Yes.

I would like to ask just a few questions when counsel is through about the matter.

Mr. Fisher: The amount which has been billed and paid would be $106,375 of the total.

The Court: The balance are estimates?

Mr. Fisher: And the balance is estimated. [4785]

The Court: All right.

Mr. Fisher: I may say in that regard, that in that total there are some amounts which I do not believe are properly attributable to this case. That is to say, some of my time given over to the problem of processing contracts in other years was included in this, and has not been segregated out.

The Court: Do we have any information as to ELP?

Mr. Fisher: Your Honor, does your Honor's requirement go that far? Because they have been dis-

missed out, and certainly it would not seem to me—that is even more remote than we think this is.

The Court: I will not pursue that.

What about amounts to Stark and his firm after their association with the case?

Mr. Fisher: That is included.

The Court: Mr. Dixon, did you want——

Mr. Fisher: Just one moment, your Honor.

No, I am in error. There is an amount of $7,300 for Mr. Stark's services during the course of the trial.

The Court: That is an additional amount?

Mr. Fisher: That would be in addition.

The Court: And is that an estimate or has that been paid, or is that paid and estimated?

Mr. Fisher: That has been actually billed. Whether it has been paid or not, I don't [4786] know.

The Court: That is to the end of the trial?

Mr. Fisher: That is my understanding.

Mr. Fowle: That is correct, your Honor.

The Court: Then you would have a rough total of about $167,300?

Mr. Fisher: Less, as I say, I would estimate several thousand dollars off of that on matters which are not really connected with this lawsuit.

The Court: In addition to the attorneys' fees, I take it that the defendant prepared itself by investigation, by auditors and accountants?

Mr. Fisher: Well, yes.

The Court: Were there other investigators employed other than auditors and accountants? I am

not going to go into amounts on that, but I would like a general statement of yes or no on that. In other words, were there investigators employed to investigate the case other than auditors and accountants and lawyers?

Mr. Fowle: Again, I say I want the record to show that we have a continuing objection to this line of inquiry. I take it that may be understood?

The Court: That may be understood.

Mr. Fowle: We had one investigator who worked on the case.

The Court: Most of the investigating work was of either [4787] a legal or an accounting nature?

Mr. Fowle: The investigative work, did you say?

The Court: Was either of a legal or an accounting nature?

Mr. Fowle: No. This investigator happens to be a lawyer, but his work was largely interviewing people and running down bits of evidence here and there and the other place. He did no legal work or any accounting work.

The Court: You didn't understand my question.

Your major problem in the case, and where most of the time was spent, was on accounting matters or on problems on which lawyers worked, legal problems?

Mr. Fowle: I would say that is correct.

The Court: Mr. Dixon, did you have any further inquiry you wanted to make of counsel?

Mr. Dixon: Yes, your Honor.

As I understand counsel's statement, this rep-

resents the amount—if I am wrong, correct me—paid Chicago counsel——

The Court: Paid all counsel.

Mr. Fisher: Paid all counsel.

Mr. Dixon: All right. I would like to ask counsel whether the amounts paid are exclusive from any retainers paid to counsel for both Sunkist, EOP, which is your firm, Mr. Fisher, and counsel for ELP, which is Mr. Stark's firm—are they computed exclusive of that arrangement, if there is one? [4788]

The Court: I will not go into the question of the amounts of your retainers, but I will permit an inquiry as to whether or not there were amounts in addition to these amounts, also retainers which your firm had? You can answer that yes or no.

Mr. Fisher: Again on this continuing objection, we do have a retainer from Sunkist, which does not cover litigated matters.

Mr. Fowle: I might say, Mr. Dixon, that we have no retainer in Chicago.

Mr. Dixon: I assumed that, counsel. Thank you.

I would like to ask this further question of counsel, as to whether or not the fee arrangement up to the time that ELP was dismissed from the case was on any basis where there was a pro rata allocation of the amount paid counsel? In other words, the reason for my question is that at the time I got into the case, Mr. Williams from the Chicago firm was carrying the ball, so to speak, for the entire case, and he was at that time, as the record shows, merely counsel for ELP. I understood that there

was some arrangement whereby that fee was divided, and I am merely inquiring as to whether that was a fact.

In other words, I know that additional amounts were paid ELP, and I am not inquiring of counsel as to what those were, I am merely inquiring as to whether the fees paid counsel in [4789] this case were determined on any allocation basis between ELP, Sunkist, and EOP, up to the time ELP was dismissed from the case.

Mr. Fisher: Do I have to answer that, your Honor?

The Court: I don't know that I understand it. I take it from your statement that the figure that you have given me is the amount which EOP and Sunkist have paid or have estimated will be paid from the start of the case to the end of the trial?

Mr. Fisher: That is right.

The Court: And that, therefore, it does not include what ELP has paid or may have to pay thereafter?

Mr. Fisher: That is correct.

The Court: I don't think we need any further inquiry. When Williams was examined, at that time he was attorney for——

Mr. Dixon: For just ELP, your Honor.

Mr. Fisher: I may say that the firm of Pope & Ballard was not retained by Sunkist and Exchange Orange until the date, you remember, that I gave you, which was March 21 of 1955. So that the amounts were paid to Mr. Williams up to that time by ELP and not Sunkist.

The Court: Then I think you want to go a little further. This case started out with Pope & Ballard and Mr. Williams acting solely for Exchange Lemon. [4790]

Mr. Fisher: That is correct.

The Court: And in the various discovery proceedings had before me, and in the matters preliminary to trial, although Williams was not acting as attorney of record for Sunkist and EOP, he was actually carrying the ball, if we can use that term, was acting as lead man among the various counsel that participated, and of course had done the preliminary work in the case on the inspection of records and so forth, which later was used by him in the defense of the action, after he came into the case for EOP and Sunkist. And overruling your objection on the same ground, I think there should be a statement of what ELP has paid and obligated itself to pay in connection with this case.

Mr. Fisher: Your Honor, before answering that I would like to make this statement, and that is in the initial part of the case and particularly during the period of time that it was pending before Judge Byrne, there were separate motions filed in all instances, and I recall Judge Byrne took the position that it made it more laborious for the plaintiff where we were proceeding that way, and thereafter wherever we could we cooperated in the type of motion which was filed.

The Court: I know that, and I know also——

Mr. Fisher: And Mr. Williams was appearing for Exchange Lemon Products. It is true that he

took, perhaps, a more active part with respect to the various motions which were [4791] filed than I did in the actual presentation.

The Court: My inquiry, and the only significance, and the major significance it has, is this: It became obvious during the trial of this matter that the defendants, or ELP, while it was a defendant, somebody who was connected with the case had practically photostated every record of the plaintiff corporation. You had photostats of complete sheets of accounts and books, the files of the Corporation Commissioner; there wasn't a thing that turned up here that there wasn't a photostat of it. Now, that took a lot of work. Now, supposing that that work—I am not talking about the mechanical part of photostating it, but examining all these files—was done for ELP and paid for by ELP, and then Williams is later on associated as attorney—strike out "Williams"—Pope & Ballard and Williams are then associated for EOP and Sunkist, and then proceed to defend the action on the basis of the previous work done for ELP, it seems to me that that has some significance in the case. It might be entirely possible that the major share of the attorneys' fees were paid out in connection with the so-called preliminary work that extended over a year or so.

Mr. Fisher: Your Honor, with reference to the large amounts of records which were photostated, that was occasioned not by our desire at all, it was occasioned by the fact that, and so far as Sunkist and Exchange Orange were concerned we [4792]

prepared interrogatories, which were heard before Judge Byrne, and Exchange Lemon Products prepared requests for examination of the books, and Judge Byrne, like yourself, said, "Here is a corporation which is unable, doesn't have the money," and so forth, and took cognizance of their financial condition, and denied our request for interrogatories, and hence we were required to proceed the other way.

It would have meant much less work for us had we had our interrogatories answered.

The Court: It may have little moment, but I would like to know what the facts and figures are as to ELP.

Mr. Dixon: I might say for the record at this point, your Honor, that Mr. Williams, I think, conducted practically all of the examination under the depositions that were taken in this case. I don't think any other counsel, with the exception of counsel for TreeSweet, actively participated in those discovery proceedings.

Mr. Fisher: Your Honor, the only deposition which the defendants took was the deposition of Mr. Winckler, which was taken by Exchange Lemon Products very early in the action. Mr. Williams did conduct that examination. I was present at the taking of both depositions.

So far as the depositions taken by the plaintiff were concerned, and there were some six of them, I don't believe that Mr. Williams was present at the taking of any of them. [4793] He may have been. I don't exactly recall.

The Court: All right.

Mr. Fisher: This, again, requires a little computation.

Mr. Fowle: I hope you will excuse the delay, your Honor, but things got so mixed up starting along about March, 1955, as to who was doing what for whom that we are having a little difficulty.

The Court: I imagine so. It is perfectly all right.

Mr. Fisher: It would be, we think, approximately $60,000.

The Court: Total of billed and paid?

Mr. Fisher: Yes.

The Court: All right.

Can we proceed to something else?

Mr. Dixon: Yes, your Honor.

Insofar as we are concerned we are content to rest on the affidavits filed in support of the application, subject of course to cross-examination by counsel for the defendants, and I think perhaps Mr. Reich wanted to say something.

Mr. Reich: No. I merely want to bring the court's attention to the fact that we have Mr. Clore Warne, a member of this Bar here before this court as an expert witness. The only point that I have in mind is the court's convenience as to whether you want to hear him after the expert witnesses of the defendants or hear him as part of our case. I [4794] think he is part of our case.

The Court: First of all, Mr. Fisher and Mr. Fowle, do you want to cross-examine Mr. Dixon on his affidavit?

Mr. Fowle: Yes, your Honor; we do.

The Court: Do you want to cross-examine Mr. Irwin on his?

Mr. Fowle: I think we do.

The Court: And Mr. Reich on his?

Mr. Fowle: I don't think we need to cross-examine him.

The Court: Mr. Warne, do you want to be called and get away?

Mr. Warne: Having in mind the proceedings here, I would prefer to listen to them until that time.

The Court: All right. Mr. Dixon.

Mr. Dixon: I might say, further, your Honor, that we would also wish to incorporate and make part of this record, on the application, the files of the case which are referred to in the affidavit.

The Court: The files of the case and the reporter's transcript will be considered as a part of this application.

Swear Mr. Dixon. [4795]

WILLIAM C. DIXON

called as a witness, after having been duly sworn, testified as follows:

The Clerk: What is your name?

The Witness: William C. Dixon.

The Court: Mr. Dixon is tendered for cross-examination on his affidavit. Is that satisfactory? Rather than have Mr. Dixon repeat by direct testimony what is in the affidavit?

Mr. Fowle: It is, your Honor.

The Court: Fine.

(Testimony of William C. Dixon.)

Cross-Examination

By Mr. Fowle:

Q. You are the same Mr. Dixon who tried this case, are you not?

A. I think I am, counsel, yes.

Q. Where did you go to law school, Mr. Dixon?

A. University of Michigan.

Q. And what year were you admitted to the Bar in the State of Ohio? A. 1928.

Q. And in the State of California?

A. 1948.

Q. I notice in your affidavit you state that at one time you were a member of the Supreme Court of Ohio? A. That is correct, counsel. [4796]

Q. For how long a period were you a member of that court?

A. I was elected to that office for what they call an unexpired term in 1938.

Q. And how long was the unexpired term?

A. It was about a three months' term. I did not run or file for re-election to the office.

Q. You did not run for re-election?

A. I did not run or file for re-election to the office. The records of the court and of the Supreme Court, and the cases during that year will indicate, counsel, the extent to which we were a member of that court and participated in the decisions of that court.

Q. You were a member of that court for approximately three months?

(Testimony of William C. Dixon.)

A. That is correct.

Q. Now, where did you practice, Mr. Dixon, before you joined the Department of Justice?

A. I was a practicing attorney in the City of Cleveland, Ohio, for a good many years, from the time of my admission to the Bar of Ohio in 1928 until I was appointed to the Department of Justice in 1944.

Q. So that your professional career before you joined the Department of Justice was in Cleveland?

A. Yes, that is correct. [4797]

Q. Were you with a firm there or did you practice alone?

A. I was with a firm of attorneys when I left law school, and stayed with that firm for a period of five years. The firm was then known as Holliday, Grossman & McAfee. They were general counsel for the Standard Oil Company of Ohio and many other clients, and I specialized during my period of practice with that firm in trial work, trying many cases of the Standard Oil Company during that period of time.

Q. What types of cases were they?

A. General litigation.

Q. When you joined the Department of Justice in 1944, I believe it was, you became assistant chief of the trial section, is that correct?

A. No, not at the time, counsel. I might say that during the period of time I also served as assistant director of law of the City of Cleveland for a period of about two years, again trying cases for the City

(Testimony of William C. Dixon.)

of Cleveland. One case in particular involving public nuisance law is the only case of record, I believe, in which a company was required to remove its plant from an area——

Q. Will you excuse me, Mr. Dixon? I was asking you about your experience with the Department of Justice.

A. I just wanted, counsel, to let you know that I have been actively engaged in the practice of law—— [4798]

Q. I just would like you to answer my questions.

The Court: Let me hear about this. This would have some significance locally.

A company was required to move its plant in a certain area?

The Witness: Yes. It was a company emitting fumes in a quasi industrial area, and complaints had been made to the mayor and the city council to do something about it. The law director and the mayor assigned the case to me, and we brought an injunction suit, and after a period of three weeks of trial the court made an order requiring the company to either abate the nuisance complained of within a period of 60 days or to remove its plant from the neighborhood. This was in the depths of the depression, 1932. The plant employed about 200 people. The order was appealed to the Court of Appeals, but we moved for dissolution of any stay or opposed any stay, and within the 60-day period the corporation decided that it had better dismantle

(Testimony of William C. Dixon.)

its plant and move to an industrial area. That abatement resulted.

* * *

The Witness: You don't get much satisfaction out of [4799] public service, as a rule, the salary is not commensurate to what is paid in private industry, but after the lawsuit was over and the plant was removed from the neighborhood, the neighborhood people did get together and have a celebration and awarded me a watch, which I still have, and in which they inscribed on the back, "In recognition of public service." So that was a compensation, at least, for doing the job.

But that is the only case that I know of, your Honor, in which a court has ever actually required a plant, and this was a large plant—it cost at that time in excess of half a million dollars—to be dismantled and removed from the neighborhood.

Go ahead, counsel.

Mr. Fowle: Your Honor, I have been very much interested in this, also, but I think perhaps——

The Court: That is because of your long stay out here in the smog.

Mr. Fowle: But perhaps I have a duty to my client to move that all of that answer be stricken as not being responsive to my question.

The Court: Overruled. I was interested. I had never heard about this.

Go ahead.

Q. (By Mr. Fowle): Mr. Dixon, during what period of time were you the assistant chief of the

(Testimony of William C. Dixon.)

trial section of [4800] the Antitrust Division of the Department of Justice?

A. Counsel, it was shortly after I completed the trial of the National Lead-DuPont case, when the chief of the section asked me to join him as assistant chief of the general litigation section. I believe it was in the early part of 1945.

Q. You went to Washington at that time?

A. I was stationed in Washington, counsel, from the time of my appointment in April of 1944, I think it was, until I was assigned out here to the West Coast in charge of the West Coast offices in 1947.

Q. And you remained in the West Coast office from '47 to '54?

A. No, I didn't, counsel. The Attorney General and the Assistant Attorney General in charge of the offices, I mean in charge of the Justice Department, at that time, Mr. Berge, asked me, when I was in Japan where I had gone as a member of the joint War and State Department Zaibatsu mission, to consider an appointment to the West Coast offices here upon my return from that mission.

I might say that when I went with the Government in 1944, I went primarily at the request of Mr. Berge, who was then the Assistant Attorney General in charge of the Antitrust Division, for the purpose of trying lawsuits, primarily the cartel case, which was the one I mentioned against [4801] National Lead and DuPont, which was the first cartel case that was brought to trial.

(Testimony of William C. Dixon.)

Q. That was an equity case, was it not?

A. Yes, it was an equity case. And it was released for trial by special presidential order because of the importance with which that case was regarded by the Government at the time. So that an early adjudication and determination could be secured of the legal questions which were involved in that lawsuit.

But, as I said, when I went with the Department I did not intend to stay with the Department. I so informed Mr. Berge. I expected to return to private practice after the end of the war.

As I said, when I returned from Japan I was requested to come out here to the West Coast to become head of the three West Coast offices, Los Angeles, San Francisco and Seattle. Which I did in 1947.

I should add, however, counsel, that while I was stationed in Washington as assistant chief of the general litigation section I was called upon by Mr. Berge and Mr. Baldridge, who was then head of the section, to go into the A & P case while it was on trial in Danville, Illinois. One of the counsel in that case, Mr. O'Donnell——

Q. Did you help try that case?

A. Yes. But I am trying to tell you how I got into it. [4802] I knew nothing about the case, but I was requested to go in and take over the work when Mr. O'Donnell, who was trying a very important part of the case at that time, collapsed in court, and had been rushed by ambulance from Dan-

(Testimony of William C. Dixon.)

ville to Chicago, Illinois. Judge Lindley, who is now on the Court of Appeals in that Circuit, was the trial judge. This happened on a Monday morning, and he gave the Government until the following Monday to get someone in there and continue with the case, that part of it which Mr. O'Donnell was trying.

The Court: All right.

Q. (By Mr. Fowle): Was that a jury case?

A. That was an equity case, counsel. Most Government cases, as you probably well know, are equity cases.

Q. Well, looking at some of the cases that you cited in your affidavit, Mr. Dixon, as I recall it, the National City Lines case was a jury case?

A. That was a jury case.

Q. Did you try that?

A. I did not try that case, counsel. That case was transferred from this court to Chicago. I had conducted the hearings, with of course the help of the counsel in the office, before the grand jury, had prepared the indictment, and expected to actually try the case. It was, however, transferred to Chicago, and due to the fact that I could not [4803] leave the office here, and in view of the fact that that was expected to be a long trial, I assigned Mr. O'Malley of our staff to try that case.

I was, however, in constant touch with him during the trial.

The Court: Was he lead counsel in that case?

The Witness: Mr. O'Malley, yes.

(Testimony of William C. Dixon.)

The Court: And was acting out of your office here?

The Witness: He was acting out of our office. That case, your Honor, was tried entirely by the staff from our office, which was under my immediate supervision. It was my responsibility.

The Court: That was a criminal case?

The Witness: That was a criminal case, yes.

Q. (By Mr. Fowle): But you didn't participate in the trial?

A. I couldn't, counsel, for the reasons that I just gave.

Q. Prior to the time that you left the Department of Justice had you tried any jury cases yourself, Mr. Dixon? A. Yes.

Q. Jury antitrust cases?

A. Yes, indeed I had.

Q. Will you tell me which ones they were, just naming them? [4804]

A. Yes. United States vs. Local 36, the A.F.& I.W.A., which was a criminal case——

Q. If you will just list the cases for me.

The Court: Is that the one we speak of as the Fishermen's case?

The Witness: That is the one known as the Fishermen's case, your Honor, yes. And it was a situation which involved new law——

Q. (By Mr. Fowle): I wonder if you would just list the cases, name the cases for me.

The Court: When a lawyer gets on the witness stand it is a wonderful opportunity to do something

(Testimony of William C. Dixon.)

he has never had a chance to do. But to speed this up——

The Witness: That is the only jury case, your Honor. Most of our cases out here did not go to trial. I mean we brought numerous cases, but most of them were settled.

Q. (By Mr. Fowle): So there is just one jury case that you tried during the 10 years that you were with the Department of Justice; is that correct? A. Well, that is correct.

Q. Did you try the Local 36 case all by yourself, Mr. Dixon? A. Counsel, no, of course not.

Q. Did you interrogate all the witnesses yourself?

A. No, I did not, counsel. I always believe when you [4805] are in charge of an office, to give everyone on the staff a chance to do the job, if they can do it. So the staff that were assigned to that case conducted most of the direct examination of the Government witnesses, because there were many, many of them. I made the opening statement; I let the men in the office, as I think they should, handle the witnesses that were assigned to them; and I think I conducted most of the cross-examination of the defendant's witnesses, but not all of it, and I made the closing arguments. That case, incidentally, counsel, involved new law, in that it applied to labor unions who called themselves independent—well, co-operatives in a sense.

That decision was of course appealed to the Court of Appeals, I argued the appeal, prepared the briefs

(Testimony of William C. Dixon.)

on it, and the Supreme Court refused—denied certiorari.

Q. I was merely interested in the extent to which you participated in the actual presentation of the case to the jury, and I think you told us that:

A. I might say, counsel, that all of the grand jury proceedings, since you have suggested that I haven't tried cases, I participated in those, I was present at every grand jury proceeding——

Q. I am not only suggesting it, but it is a fact, isn't it, except for the Local 36 case?

The Court: Let's go ahead. I will instruct you like [4806] we have to instruct witnesses: You listen to the question and answer it.

Q. (By Mr. Fowle): May I ask this question, Mr. Dixon: Was the Winckler & Smith case the first treble damage suit that you were involved in under the antitrust law?

A. It is certainly the first one, counsel, because I have been out of Government service——

Q. Answer the question yes or no.

A. Yes.

The Court: The answer is yes.

Q. (By Mr. Fowle): I take it in view of your Government employment during the 10-year period ending 1954, you were not engaged in any private practice during that time?

A. Of course not, counsel.

Q. What was the amount of your Government salary, Mr. Dixon, the last year that you were employed by the Government?

(Testimony of William C. Dixon.)

A. It was, I believe, $12,300 a year, which was the top salary then paid any member of the staff, with the exception of those that were exempt, in the exempt classification. That is my recollection.

The Court: The record will show that I was United States Attorney and he was getting more money than I got.

Mr. Fowle: I know that you were United States Attorney at the time, your Honor, because one could look at the cases [4807] and see the association.

The Court: I was getting $10,000 a year, and I didn't know until now that he was getting $12,000.

Q. (By Mr. Fowle): When you entered private practice in 1954, Mr. Dixon, did you start out to practice alone or were you in a partnership?

A. No, I had some opportunities if I wished to do so to join legal association with firms. I did not desire to do so. I, therefore, initiated my private practice as an individual practitioner.

Q. You left the Government, I believe, in April of '54?

A. I think it was a little earlier that that, counsel. It was the early part of that year.

Q. And you did not get involved in the Winckler case until the latter part of 1954, is that correct?

A. I believe that is correct, counsel, yes.

Q. What type of a practice did you have, Mr. Dixon, between the time you left the government in 1954 and the end of that year, shall we say?

A. Do you mean what type of practice?

Q. Yes.

(Testimony of William C. Dixon.)

A. I was specializing in trade regulation matters entirely. There were a few matters that I handled for private clients, but I am not engaged, counsel, in general practice, if that is your question. [4808]

Q. Would you be able to tell me approximately what your earnings were from the practice of law, from the private practice of law, during the year 1954?

A. Well, the first year when you are starting out in private practice, counsel——

Q. It is likely to be lean, I know, Mr. Dixon. But I wonder if you could give me an approximate figure.

A. Well, you tax my memory. I would say it was less than my salary from the government, after I paid the office overhead and everything that goes along with it. I knew it would be, and I expected it would be.

Q. Did you have, during this portion of 1954, after you left the government, did you have per diem rates or hourly rates which you charged clients for the work you did for them?

A. No, I didn't. The per diem system, counsel, applies to large law firms. Having started to practice with a large law firm, I know exactly how that system works. And an individual practitioner when he represents clients usually makes his own arrangement with the client, at least I do, and I inform them in advance of what the arrangement is under which I will handle the matter.

(Testimony of William C. Dixon.)

The Court: But you didn't have it?

The Witness: That is right, I had no per diem charge.

Q. (By Mr. Fowle): How did you determine just what you would charge the clients for whom you did work during 1954? [4809]

A. Well, I think I determined it based on the results achieved, the general amount of time put in, the capacity and ability of the client to pay, and all those factors that usually enter into a matter when you are billing a client.

Q. But you didn't use a per diem rate?

A. Sometimes I billed nothing, if that is of any assistance to you.

Q. We all have that experience. But you didn't use an hourly rate or per diem?

A. No, I used no set hourly rate, because I don't think it is applicable to a specialized type of practice that you are trying to develop.

Q. Incidentally, did you keep time records during 1954?

A. Mr. Fisher asked me that, and I answered it that when I got into this case I did make a few notes, I wouldn't call them time records, counsel, at the outset. They were not complete, as I explained to Mr. Fisher. After I had been in this case for, I think it was a month and a half or two months, I ceased to keep any time records, because it became practically a full-time job. By that I mean not only every day, but Saturdays, as well.

Q. Sundays? A. Sometimes, yes.

(Testimony of William C. Dixon.)

Q. What other practice did you have during 1955, Mr. [4810] Dixon, than the Winckler-Smith case? A. I had practically none, counsel.

Q. Did you have some?

A. I had some. Very little.

Q. Did you charge clients that brought that practice to you fees? A. I certainly did.

Q. How did you determine those fees? Did you use an hourly rate or per diem rate?

A. On the basis of the questions presented, the risk involved, insofar as the client was concerned the results achieved for the client, and of course to some extent the amount of time that was put in. The time was not the determining factor, I assure you.

Q. You don't pay much attention to that?

A. No, I don't. And you can't in this kind of business, unless you are making an arrangement on that basis, counsel. And I have one of those, a client, that—I will just answer the questions. Go ahead.

Q. When you first were retained in this case, did you have any understanding as to what your compensation was to be?

A. No, I fully understood, counsel, that there was nothing here with which to pay a lawyer; that whatever fees were determined due me, assuming that there was something with which to pay them, that those fees would be determined by [4811] this court or by the court.

Q. Did you understand that you were to receive any compensation other than that fixed by the court

(Testimony of William C. Dixon.)

—that might be fixed by the court, in the event of a success?

A. I think the order is on. I frankly didn't pay much attention to it, but it is my understanding that the order provides that it is a matter for the court to determine what my fee shall be, based on all of the factors that usually go into a consideration under which a lawyer is paid for services rendered.

Q. I don't believe my question is quite answered, Mr. Dixon. Did you understand that you were to receive compensation from any source other than the order allowing fees by the court here, in the event of a success?

The Court: What do you mean, other source? Do you mean some outside party?

Mr. Fowle: Correct.

The Witness: No one has ever told me that they would pay me a dime, counsel, if that is your question.

Whatever I am paid, if anything, will have to necessarily come from whatever this corporation has.

There is no other source to pay me, and no one has promised to pay me anything, and I wouldn't solicit any promise from anybody to pay me.

Q. (By Mr. Fowle): As I understand it, when you were [4812] first retained in this case——

A. You use the word "retained" wrong, counsel. There was no retainer paid me in this case, if you are using "retained" in that sense.

(Testimony of William C. Dixon.)

Q. Thank you for your correction.

When you first came into the case, shall we put it that way—when you first came into the case, I believe you made a rather extensive investigation before you decided whether to go ahead with it; is that not true? A. I spent some time, yes.

Q. How much time did you spend doing that?

A. That would be hard to estimate, counsel. It antedated, I think, the sheet that I gave to Mr. Fisher. I can't answer you on that. As to the amount of time, I couldn't say. It would be a guess at best.

Q. Would you give us your best guess?

A. Well, I would hate to hazard a guess. I would say that I spent, at intermittent periods, at least three or four weeks, counsel. I may be wrong one way or the other. It is a matter of recollection. I just can't give you any better answer than that.

Q. Is that time included in the 2,500 hours to which you referred?

A. No, it is not, counsel. Yes—no, it isn't, to answer your question, it is not. [4813]

Q. Which is it?

A. It is not included in that.

Q. At what point does the 2,500 hours begin?

A. It starts about the time that I started to keep the time sheet there that I showed to Mr. Fisher, and that is only my recollection of the approximate time, because there were things there which developed from time to time that developed rather quickly I can't tell you just when it was.

(Testimony of William C. Dixon.)

Q. Mr. Reich was attorney for the trustee for some period of time, was he not?

A. No, I don't believe Mr. Reich was ever attorney for the trustee. But if he was, I am not aware of it.

Q. Who was he attorney for?

A. For Mr. Irwin.

The Court: Mr. Reich?

The Witness: For the trustee, he said.

The Court: He said who was Mr. Reich attorney for.

The Witness: Oh. I think Mr. Reich, as I recall it—my contact with him was as the attorney who filed the lawsuit in the first instance.

The Court: For the corporation?

The Witness: For the corporation, and before there was any proceeding under Chapter X.

Q. (By Mr. Fowle): You know Mr. Reich, I take it? A. Of course I know him. [4814]

Q. Was he not in the case in some capacity when you came into the case?

A. Well, counsel, I would hate to have to answer that, because I don't know. I know there was some question as to whether he was in or out of the case at that time.

Q. I heard you mention earlier at this hearing this morning, I believe, that he withdrew from the case?

A. I think he did, yes, he ultimately withdrew.

Q. Do you know why he withdrew?

A. I would prefer to have him answer that. I

(Testimony of William C. Dixon.)

can't speak for Mr. Reich. I knew that he withdrew from the case, and I entered the case.

Q. He withdrew about the time that you entered?

A. I can't even answer that, as to when he actually formally withdrew.

The Court: There is an order in the file both as to the withdrawal of Mr. Reich and the employment of Mr. Dixon. Have you looked at them?

Mr. Fowle: I believe we have.

The Court: I was going to suggest, paraphrasing that old story, that if you are doing this for me, speed it up; if you are doing it for the Circuit, then take your time.

Mr. Fowle: Must I answer that on the record?

The Court: No, you don't have to say a word.

Q. (By Mr. Fowle): At some stage of the game, Mr. Dixon, [4815] you had to learn a good bit about the citrus fruit business, didn't you?

A. That is an understatement. I was learning about it right up to the time of trial and during the trial.

Q. Did you learn anything about the citrus fruit business from Mr. Reich?

A. I don't think Mr. Reich is in the citrus business, counsel.

Q. Well, have you read his affidavit?

A. To be perfectly frank with you, I haven't, no.

Q. Well, you didn't learn anything about the citrus fruit business from Mr. Reich, I take it?

A. Well, I had some conferences with Mr. Reich.

(Testimony of William C. Dixon.)

It depends on what you mean by, Did I learn something about the citrus fruit industry.

Yes, Mr. Reich had been in the case, and he obviously knew something about it, and I had some questions which I asked him about it.

I might say that I got some information from him.

Q. To what extent was the case prepared for trial by the time you came in?

A. That is a very difficult question to answer, counsel. Insofar as I was concerned, it was not prepared. I was not ready to go to trial, and would not think of proceeding to trial on the status of the situation as I discovered it at [4816] that time, after investigation.

Q. Certain depositions were taken prior to your appearing on the scene? A. That is correct.

Q. Did you use those at the trial of this case?

A. I did not. I read them, however, not once but several times.

Q. Did you find them useful?

A. They gave me some background information, yes.

Q. Did you receive any legal memos from Mr. Reich at the time you came into the case?

A. What do you mean? Did I ask him for advice—to prepare some legal memos for me?

Q. No. Did he have some legal memos in the file that he turned over to you?

A. Counsel, the file contained a voluminous amount of legal memoranda, if that is your question.

(Testimony of William C. Dixon.)

I naturally examined those to familiarize myself with the background of the case, and to the extent that those legal memoranda were in the file and prepared by Mr. Reich, they were examined by me, if that is your question.

Q. You say that substantially all of your time was spent on this case since September, 1954; I take it that is correct?

A. That is in substance correct. I don't want you to [4817] get the impression——

Q. Approximately what proportion of your time did you not spend on this case? A. Well——

Q. Could you just give us a rough estimate?

A. I would say about 5 per cent, counsel. It was dealing with things that I could dispose of in a short period of time. In other words, I could not get committed to anything which would take any long period of time, with this lawsuit. I was accordingly unable to make any commitments to any other clients on any matters that would require an extended period of time, as far as I was concerned, as long as I had this case.

Q. Could you tell us how you computed the figure of 2,500 hours, or somewhat in excess of 2,500 hours, could you tell us how you reached that figure?

A. Yes, that is very easy. I know that the average law office figures about five or six hours chargeable time, I figured on this case an average of at least eight hours, a day, for a full work week, and there were of course many Saturdays, and considerable evening work that was involved in the prep-

(Testimony of William C. Dixon.)

aration of this case for trial, and while I have had the responsibility for it.

Q. You say you figured you worked eight hours a day on the average? [4818]

A. That is right.

Q. For what—for this entire period?

A. You are correct.

Q. You mean seven days a week?

A. No, no; I didn't say seven days a week, counsel. I said a five-day week with many Saturdays, and frequently Sundays. Many a time I have taken files home and exhibits, and so forth, in this case, not only for Saturdays, but Sundays as well. I did not have the benefit of several assistants that I had when I was with the Department of Justice. Otherwise I could have done it in a five-day week.

Q. I take it you had no assistants in your office?

A. I had no assistance, other than what Mr. Irwin gave me in this case.

Q. Of the 2500 hours that you estimate you spent on this case, how much of it would you estimate was spent before the trial started, before December 13, 1955?

A. That is a very difficult question to answer, counsel.

Q. Well, do the best you can.

A. There was very little difference in the amount of time spent prior to trial and the time spent afterwards, except that the pressure in-

(Testimony of William C. Dixon.)

creased, and more evening and Saurday and Sunday work——

Q. Perhaps you don't understand my [4819] question.

A. I understand your question. I am trying to answer it by telling you that I can't give you an answer except to indicate in general terms what I did, because I did not keep any time records, as you do in a large law office where you are charging a client on a per diem basis.

Q. Do you mean you are unable to answer the question?

A. Rephrase it, or give it again, and I will try to do the best I can.

Q. I am asking you if you will to the best of your ability divide the 2500 hours into two parts, one part prior to December 13th when the trial started, and the other after that date.

A. Counsel, in arriving at the 2500 hour figure, approximately, and it is approximate for the reasons that I have given, I took into consideration the fact that I had devoted substantially all of my time to this case from the time I mentioned. That as we approached the trial date, and keep in mind that we had, I believe, two trial dates set in this case, counsel, and they were changed, to that the pressure was always on—we had, as you may not know, I don't know whether you do or not, but it is my recollection that in this case we had two prior trial dates before we actually came into court to start the trial of this case. So that after we got

(Testimony of William C. Dixon.)

into trial, or as we approached the trial, it was constant night work, Saturdays and some Sundays. During the trial it [4820] was constant. I had no help in preparing instructions, or those various other things that had to be done. Someone had to do it, and I was the only one that could do it.

Q. I am just trying to get from you how much of your time was spent before the case went to trial. If you can't answer it, perhaps the best thing to do is to say you don't know.

A. I don't want the record to show anything other than what I have indicated, counsel, and you can draw your own conclusions or inferences from it. I can't tell you approximately how much time was spent before the time of trial. Maybe you could say two-thirds of it was. I don't know. It would be purely approximate and purely a guess. But the time was spent, that I would assure you.

Q. I am not questioning that the time was spent, Mr. Dixon; I am simply trying to find out how much of it was spent before the trial started.

A. Certainly I would say the greater substantial part of it was spent before trial, because you don't go into trial in an antitrust case unless you are thoroughly prepared, and you don't prepare a case of this kind on 24 hours' notice, counsel.

Q. I think we both understand that. Let me just ask you this, Mr. Dixon: Supposing you had a law clerk in your office who could have helped you with this, how much of the [4821] 2500 hours do you suppose would have been his?

(Testimony of William C. Dixon.)

A. It would have probably been very little, counsel, to be perfectly frank with you.

Q. Well——

A. Because when I prepare a case, as I have had to prepare this case, there are things that you cannot delegate or assign, but which you must do yourself, if the case is to be properly prepared and properly presented in court, because no law clerk can get things for me, and couldn't get them in this case, that would be of too much assistance to me in cross-examining some of the witnesses that I had to examine in this case.

Q. When you were with the government you had assistants helping you with the trials of cases there, didn't you?

A. Of course, counsel. And when you are with the government you have the FBI to go out and do all of your investigative work, you have relatively speaking unlimited facilities at your command. Those were not available to me in this case.

Q. Supposing you had had an investigator here, how much of the 2500 hours that you estimate was spent here would have been turned over to the investigator?

A. To answer your question, I would say practically none, counsel. The type of investigative work that I had to do—that is your question—related to the kind of thing [4822] that we did out at the office here of Exchange Orange when we went out to look at your records to see what you had, and to read them, and to take from those records

(Testimony of William C. Dixon.)

the things that I regarded as important to this lawsuit.

Now, you couldn't trust that assignment to any law clerk. At least I wouldn't.

Q. So you say practically none of the time would have been put in by an investigator if you had had one?

A. I could certainly have used not one but several, counsel. There were plenty of things that I would like to have done in this case that I couldn't do.

Q. I am trying to find out just to get an estimate from you, as to how much of this 2500 hours would have been put in by an investigator if you had had one.

A. From that point of view, you can say practically none, as I stated a few minutes ago.

Q. And the same thing is true, then, I take it, of a potential law clerk, if you had had a potential law clerk he wouldn't have spent any of this time either?

A. He might have been of some assistance.

Q. Some minor assistance to you, perhaps?

A. He could have been, yes.

Q. So the lack of funds which the plaintiff had here, which is mentioned in your affidavit, really didn't handicap you very much, did it? [4823]

A. Well, yes, it did substantially, counsel, although it wasn't a factor. Let me explain what I mean. You well knew, counsel, what your staff was constantly doing during the preparation of this

(Testimony of William C. Dixon.)

trial. You were constantly examining the files and records of this company. I am frank to say that apart from the services of Mr. Smith, whom I asked, I said, "well, try and find out what they are looking at, and be sure that if they are taking something that you at least know what it is so that you can tell me what it is, and I will then have a chance to look at it"—that is the type of thing that I am talking about, counsel, and Mr. Smith did do some investigative work of that kind of the books of the company. But I could certainly have used the service of three or four men to work with your staff, had they been available, and I would have been much better prepared, probably. Whether it would have changed the result is problematical. But I would certainly have been much better informed, put it that way.

Q. But your statement to me, I take it, is essentially this: If you had had additional assistants, legal assistants, or investigative assistants, it would not have substantially reduced the number of hours which you say you spent on this case?

A. As far as I am concerned, it would not have detracted to any extent at all from the time that I would have had to put in this case, counsel, because I would have had to [4824] have directed that work to be done, and that is my point, that is the investigative type of work that I mentioned, to the extent that I had to do it myself, of the kind I mentioned, I did it. But there were many, many things which I would have liked to have done,

(Testimony of William C. Dixon.)

which I would have instructed someone to have done, had the funds been available to do it.

Q. So your 2500 hours would have remained approximately the same?

A. They would have, counsel, yes.

Q. Do you place the same value, Mr. Dixon, on the hours you spent in examining documents, as you place on the hours you spent here in the court room?

A. Of course not, counsel. If you want to separate the two, and if you are trying to say that the services should be valued on a per diem basis, the answer is obviously no. No lawyer goes into the court room and tries a lawsuit on the same basis that he charges a client on per diem work in his office.

Q. Let me ask you how you computed the sum of $350,000?

A. Well, counsel, it is computed, based on the amount, in part, which the court allowed in the Emich case in which your firm was counsel.

Q. You know what happened to the Emich case, don't you?

A. Yes, I know very well what happened to the Emich [4825] case, but that doesn't change the fact that the trial court allowed attorneys' fees in that case.

Q. The judgment was reversed, wasn't it?

A. But the attorneys' fees was not reversed. The case is still back for a new trial.

Q. The entire judgment was reversed. Mr.

(Testimony of William C. Dixon.)

Dixon, you know that. The allowance of attorneys' fees is out the window, isn't that true?

A. No, it isn't out the window.

Q. Of course it is. You know that.

A. The case is still pending, as far as I am concerned, as far as I know.

The Court: Look, both of you are wasting time. In the Emich case the judgment was reversed, but it wasn't reversed, as you read it, because of the award of attorneys' fees. Having been reversed, now, there is no award of attorneys' fees.

Mr. Fowle: That is my point. There is no award left.

The Court: You don't have to pound these things into my head about these cases. I know a little something about it.

Q. (By Mr. Fowle): You say you used the Emich case as basing your attorneys' fees of $350,000. What other factors did you take into consideration?

A. Counsel, I prefer not to—unless you want me to—discuss conversation I had with a member of your own firm about the fees, when I was still considering getting into this [4826] case, Mr. Williams. I will be glad to recount it if you wish me to do it. But I would prefer not to.

Q. I know nothing about the conversation.

A. I know Mel Williams very well, and I prefer not to recount that conversation, but I assure you—well.

Q. You and he discussed a possible fee for you?

(Testimony of William C. Dixon.)

A. No, indeed not, counsel. But it was indicated what the fees of your firm might be if this case went to trial.

Q. Were you surprised when you heard the figures today? A. Not too much, no.

Q. Well, aside from this conversation that you had with Mr. Williams, and the Emich case, what other factors did you take into consideration?

A. The results achieved, I think, are one of the things entitled to be taken into consideration. Second, the fact——

Q. Are these things that you actually took into consideration?

A. Yes. You asked me that question, didn't you?

Q. I did.

A. I will be glad to relate some of the others if you wish.

Q. Let me ask you this: Did you consider the question of the ability of the defendants to pay?

A. Well, no. I assume they are collectible, or would be, on any judgment that would be [4827] secured.

Q. Did you take into consideration the contingent nature of the fee here?

A. No, I did not, counsel.

Q. Did you take into consideration the verdict itself, or the verdict as trebled?

A. Well, I considered the verdict as trebled, in part, and I have in mind, of course, that as being one of the results of this lawsuit. The recovery here, although that is not a factor in determining

(Testimony of William C. Dixon.)

the application or the amount requested, it is certainly one of those things that should be taken into consideration in determining the fee, in my judgment. [4828]

* * *

HARRY M. IRWIN

called as a witness, after being first previously duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Harry M. Irwin.

Cross-Examination

By Mr. Fowle:

Q. You are the same Mr. Irwin who has been present here throughout this trial representing the trustee, Mr. Walker; is that correct?

A. So far as I know, I am—

Q. I understand that you have been admitted to the Bars of the States of California and Missouri, is that correct? A. That is true.

Q. When were you admitted to the Bar of the State of California, Mr. Irwin?

A. I don't remember the exact year. About 1917. [4830]

Q. Missouri?

A. Missouri was some three or four years before that.

Q. What was the nature of your legal education, just in general? Where did you go to law school?

(Testimony of Harry M. Irwin.)

A. I never went to law school. As a matter of fact, I began court reporting when I was 16 years old and continued court reporting for 17 years back in Missouri, and during that time I studied law in contact with the lawyers and judges on the bench, and some two or three years before I stopped court reporting, I was admitted to the Bar in the Circuit where I was court reporting, and afterwards was admitted by the Supreme Court.

Q. And you have been practicing in Los Angeles ever since 1917 or thereabouts?

A. Approximately that time, yes, engaged in civil practice in Los Angeles.

Q. Have you been practicing law alone or with others?

A. I never had a partnership. I have been alone. And, of course, in individual matters I have been associated with other attorneys.

Q. But you have not been a member of a partnership? A. I have not.

Q. In a general way what has been the type of your practice during say, a 10-year period prior to the commencement of this lawsuit? [4831]

A. I would say civil, and mostly as relating to business matters. I never handled any criminal matters, except on exceptional occasions in small matters.

Q. To what extent have you participated in litigation?

A. I have tried to avoid trials as much as I can,

(Testimony of Harry M. Irwin.)

but each year I have had several cases which could not be settled or adjusted in any way, and I have conducted various trials. Practically every year throughout that period of time since 1917.

The Court: I think I ought to state for the record what may be known to some members of the Bar, but what may not be known to you. I had my first job in Harry Irwin's office, and worked there as a young lawyer for about a year, and wound up by almost getting fired, but not quite.

The Witness: That is Judge Carters' version of it.

The Court: I have a good bit of information, which I suppose all lawyers have about other lawyers in the community, about Mr. Irwin and his practice. I can't say anything about the last few years, but back in '28 and '29, and times before and after that.

Q. (By Mr. Fowle): These trials that you speak of, Mr. Irwin, did they involve juries, were they jury trials?

A. Yes, they involved both jury and court trials without a jury.

Q. But you don't regard yourself as a trial lawyer [4832] primarily?

A. I prefer others to express the opinion as to my ability on that. I have been reasonably successful in trials, both before the court alone and before juries.

The Court: May I say, also, that when I worked

(Testimony of Harry M. Irwin.)

for him, he was known as the dead man's lawyer in Chinatown.

Mr. Fowle: I don't quite understand that.

The Court: Whenever some Chinaman got hurt or killed and wanted somebody to handle a good personal injury case, they generally looked up Harry Irwin.

Am I misstating that?

The Witness: No. That was the nickname by which some of the Chinese knew me.

Q. (By Mr. Fowle): Prior to this case, Mr. Irwin, had you engaged in any antitrust work?

A. Only incidentally. I never engaged in any trial, and only casually.

Q. You had antitrust law problems in your office, did you?

A. Only incidentally. I wouldn't consider myself at all as a specialist in antitrust law or litigation.

I might say that I have learned quite a bit about it in the four years that I have been engaged in this case.

Q. Let's take the year 1951, Mr. Irwin, which was the first year immediately prior to the beginning of this lawsuit; [4833] would you state, please, what your earnings were in that year from the practice of law?

A. I couldn't possibly state that from memory. Earnings of a private lawyer with such practice as I had would vary greatly from year to year. And purely as a matter of guesswork, I would say,

(Testimony of Harry M. Irwin.)

if I had to guess or estimate it, I would say in excess of $25,000, although I would have to look at my records to ascertain.

Q. What about the year 1950?

A. I can't separate years. My earnings, to cover a general average, have ranged from, considerably in excess of $50,000 down to a much smaller amount.

Q. What would you say the average was during the five-year period immediately preceding the institution of this case?

A. I couldn't possibly answer that question.

Q. In your practice did you and do you have regular per diem rates that you charge clients?

A. I never charged a client on a per diem rate so far as I can recall, in my whole experience.

Q. Or on an hourly basis?

A. Never base my charges on an hourly basis. I base my charges largely on the importance of the matter to the client, the difficulty of the situation, and the results accomplished. [4834]

Q. Do you keep time records, Mr. Irwin, of the time spent on clients' matters?

A. I never kept anything that would approach a time record, except in, we might say, bankruptcy matters. And even that is not a time record. But I am a little more particular in noting in my daybook that I have been engaged in something relating to a bankruptcy matter than I would for the regular private client. Because I understand that while I am not what would be a regular specialist in bank-

(Testimony of Harry M. Irwin.)

ruptcy matters, I do understand that in bankruptcy matters in an application to the court for an allowance of fee there must be some general statement as to the time employed.

Q. Have you kept any records of the time spent on this particular case?

A. Yes, sir, I have kept and do keep an office daybook in which I simply note down the name of the client, the telephone call, the letter, or the matter in which I am engaged. I very seldom put in the length of time. And in this case I very, very rarely put the length of time, unless it would be several hours, or perhaps for a whole day that I would spend in this particular case.

Q. But you have no really accurate time records of the time spent in this case?

A. Not a regular time sheet such as I understand the larger offices keep. [4835]

Q. Do you have any lawyers working for you, Mr. Irwin? Any lawyer employees in your office?

A. No. At this time I do not have anyone employed by me.

Q. I mean since 1951, or thereabouts.

A. No. I might say that since about that time I have given my time to substantial matters for clients, or in which I would be employed, and I have not handled what you might term as smaller matters wherein you would use an assistant or law clerk. In those matters, when the matter is of sufficient importance, I would associate somebody with me rather than employ a younger attorney.

(Testimony of Harry M. Irwin.)

Q. You came into this case on about what date?

A. Approximately April, 1952. That is to say, Mr. Walker was appointed trustee in the Chapter X proceeding in the latter part of March or first of April, and I was employed as his attorney in the Chapter X proceedings, and approximately at the same time I was informed of the pendency of this antitrust action, which had been commenced by the debtor before our appointment or employment, and one of my duties immediately was to look into this matter and to see what interest the trustee might have or the estate might have in this matter, and to determine what course we should pursue with reference to this litigation.

Of course that involved an investigation and study of the [4836] facts and the law, and a determination as to whether or not we would intervene in behalf of the trustee as a plaintiff in this action.

Q. Did you make such a study?

A. Yes, I did.

Q. What study of the law did you make?

A. I examined the pleadings, I conferred with Mr. Reich as to his theory of the case. I looked into the matter generally. I can't tell you in detail just everything that I did.

Q. Well, after the trustee intervened in this case, with you as the trustee's attorney, what if any understanding did you have with respect to what your compensation was to be for services rendered in connection with this case?

A. Nothing whatever, except only that under

(Testimony of Harry M. Irwin.)

the law my fee in this Chapter X proceeding for my services to the estate, and to the trustee, would eventually be fixed and determined by the court.

Q. At that time Mr. Reich, as I understand it, was attorney for the Winckler & Smith Company?

A. He was at the time, and has continued to be, so far as I know. But he is the attorney who originally brought the action for Winckler & Smith.

Q. Do you know whether Mr. Reich or any other attorney for either the plaintiff or the intervenor has any [4837] contingent fee interest in any judgment that may be rendered in this case?

A. So far as I know, I think I can say that I do know that there is no such contingent fee.

Mr. Reich was employed as special counsel by an order or orders in the Chapter X proceeding, and that order—well, there was an order and an amended order, and the amended order provided that he should be paid such amount for his services in the proceeding as should be fixed and determined by the court. Thereafter, when he retired as attorney for the trustee, a subsequent order was made to the same effect, that is, that he eventually—I don't know if it specified a time—but that the court could fix and determine what fee he should be entitled to for his services up to the time that he withdrew from the case as attorney for the trustee.

Q. So that so far as you know Mr. Reich's fees here will be only such as may be allowed by the court; is that correct?

A. My understanding is—I don't want to fall

(Testimony of Harry M. Irwin.)

into the fault of talking too much, but if you want my understanding of the law, I understand that the trustee took over, under his appointment as trustee, all of the rights of the debtor Winckler & Smith, and thereafter all fees, costs, and expenses were under the jurisdiction and direction of the judge in the Chapter X proceeding, including the fixing of the fees. [4838] And the contingency, if any, I suppose, would be whether or not the estate had any money out of which to pay the fee that the court might allow to him.

Q. When did Mr. Reich withdraw?

A. The order terminating his employment was made some time in October. But we were advised——

Q. October of what year?

A. October of 1954. But we were advised in about July or perhaps August of 1954 of his desire and intention to withdraw. And it was at that time that we began conferring—I say "we," meaning Mr. Walker, the trustee, and myself—began conferring with Mr. Dixon here with regard to his employment to act as special counsel in the conduct of this action.

Q. Did Mr. Reich participate in the preparation for trial, or any aspect of the work in connection with preparation for trial, after he withdrew in or about October, 1954?

A. The word "participate" has a rather sweeping meaning. As far as I know, I think he—I don't think I should say that, but I think Mr. Dixon is

(Testimony of Harry M. Irwin.)

more informed, and I think he has testified as to just what occurred between him and Mr. Reich.

So far as I was concerned, I left the conferences of those matters, and whatever may have been done, to Mr. Reich and Mr. Dixon.

I will only say that I am sure that Mr. Reich furnished [4839] whatever information that Mr. Dixon called on him to give, which was within his power.

Q. I was simply trying to find out how much you knew about what work Mr. Reich did on the case after October, 1954.

A. All I can say is that I never participated, so far as I know, perhaps, more than once or twice in conferences—in the midst of my answer I recall that Mr. Reich was in Mr. Dixon's office on perhaps two or more occasions after that time when certain matters were discussed. But so far as conferences personally with Mr. Reich after that time, I had none, and, of course, I understood that his official employment as special attorney for the trustee was terminated by the court's order. But I want to say that Mr. Reich at all times showed a willingness to give to Mr. Dixon and to me, as attorneys in the matter, any matters or information within his possession. But those conferences or communications were between Mr. Dixon and Mr. Reich, almost altogether. Hardly any with me personally.

Q. I understand that your estimate is that you have devoted approximately 2,000 hours to this case; is that correct?

(Testimony of Harry M. Irwin.)

A. Yes. And I base that on the number of notations in my book as to the various things—my day-books—as to what I did, and on the basis of those I can account for approximately 1,200, somewhere in there, hours, and in addition to that [4840] I know, as perhaps every attorney knows, that there were conferences, time spent in study, and so on, that do not go down in such a day book as I kept.

I will have to qualify that from the standpoint of being completely accurate. I said not much was in the book. I have not noted, since about the 1st of December, or even before that—I have made very few notations of the fact that we were engaged in the preparation of trial or conducting the trial of this case, so I made a broad estimate as to the time that I know was employed both in trial and in preparation for trial, and I have included that in the time that I stated.

Q. Does the 2,000 hours include any time devoted to representation of the trustee, other than the trustee in his capacity as an intervenor in this case?

A. No. I have tried to exclude, in coming to that conclusion of 2,000 hours, I have tried to exclude all time that was spent in the other matters, in the Chapter X proceedings, except only matters relating to this particular antitrust action.

Q. The TreeSweet Products Company was involved in this case at one time, as you recall?

A. That is true.

(Testimony of Harry M. Irwin.)

Q. A settlement was made with them, as I understand it?

A. Yes, they paid a consideration and the trustee [4841] executed a covenant not to sue, and an amount was paid——

Q. Did you participate in the negotiations for that settlement?

A. I had several conferences with the attorneys for TreeSweet and with the trustee, and also with Mr. Reich, and the trustee and I had to determine whether or not such an instrument would operate as against our continuing the prosecution of the action against the remaining defendants. I can't tell you the time I spent on that, but I did give serious consideration to that matter.

Q. You spent some time in negotiations of the matter with counsel for TreeSweet, did you not?

A. So far as the negotiations were concerned, I do not recall that I participated in the negotiations. I know Mr. Walker, the trustee, participated in those, and I am sure that Mr. Reich did, but I do not know that of my own knowledge.

Q. Was the time that you devoted to this problem, the TreeSweet settlement, included in the 2,000 hours? A. Yes, I think so.

Q. And approximately how much?

A. I considered that as a part of the attorneys' services that were tried to be rendered in this action.

Q. And after the TreeSweet settlement you filed a petition for allowance of attorneys' fees in the

(Testimony of Harry M. Irwin.)

Chapter X [4842] proceedings or Chapter XI proceedings?

A. I did not.

Q. Did Mr. Reich file such a petition?

A. Not to my knowledge.

The Court: I think that both of them filed some application for the fixing of some percentage of fees, and then you withdrew——

The Witness: That is correct. I hadn't recalled that, but Mr. Reich filed an application along about July or August of 1954 for revision of the terms of his employment, so that his fee would be based on a certain percentage, and at that time I did file a petition that if the court should grant Mr. Reich's petition to fix a percentage, that the court should at that time fix my attorney's fee at such amount or percentage as the court would deem just.

Q. (By Mr. Fowle): Was there a hearing on that matter?

A. I wouldn't say that there was a hearing on my motion, because it was only in the alternative, and would not be a motion unless the court granted Mr. Reich's motion, and Mr. Reich's motion was denied.

Pardon me. One thing. You asked me if I filed a petition after the conclusion of the TreeSweet matter, and I understood you to mean for attorneys' fees in connection with the TreeSweet settlement, and my answer, "No," was intended to mean that I did not file any petition for an allowance of fees [4843] for my services in connection with the TreeSweet settlement.

(Testimony of Harry M. Irwin.)

Q. To return for a moment to your estimate of 2,000 hours, Mr. Irwin, can you give us an estimate of how much of that time was spent before the trial began in this case?

A. That would be a very rough approximation.

Q. Can you give us an approximation?

A. Before the actual trial commenced, and including the time spent immediately before—when I say "immediately," within two or three months of when the case was set and afterwards reset for trial—I would say that one-third or more of the time was spent during the trial, and perhaps two-thirds before the trial. I base that on this statement: The trial continued approximately two months, and if I would undertake to average the time working day and night, Saturdays and Sundays, too, I know I would be on the conservative side if I would say that I spent more than 10 hours every day or an average for the 60 days during the trial working in direct connection with the trial. In other words, that would be 600 hours that I spent during the trial.

Q. You would estimate that approximately two-thirds of the 2,000 hours was spent before the trial started?

A. I would. I would say I spent more than 12 hours a day during the trial, actual trial of the case.

Q. How much was that? Twelve hours a day?

A. Yes. [4844]

Q. Every day?

(Testimony of Harry M. Irwin.)

A. I would say it would average that. Some of them a great deal more than that.

I know we were usually down in court before 9:00 o'clock, at the office working on this before 9:00 o'clock, and many nights I spent until after midnight in reviewing the testimony of the day, and preparatory evidence, in preparing evidence and analyzing evidence either to rebut the evidence that had been introduced or to prepare for our own presentation of the case. And I think I may say——

Q. You think you averaged 12 hours a day for two months?

A. Yes. That is not an unusual time for an attorney who is busily engaged in a case, to do that. I spend a great deal more than that many times.

Q. Your affidavit says that you examined and digested voluminous and complex records and facts of the plaintiff and the defendants. Do you recall that statement? A. Yes.

Q. How much of your time, that is, of the 2,000 hours, would you say, Mr. Irwin, was devoted to that type of work?

A. I can't apportion that. But I might say that primarily it was more or less delegated to me, or I assumed the work of making an examination and an analysis of the cost [4845] and damage records, because of the effect of the defendants' act, and as a causation of the damages which we claimed for the plaintiff and trustee, and the evidence which would bear thereon; and also an analysis of those facts so as to prepare or be prepared to present a

(Testimony of Harry M. Irwin.)

concise and a simple statement thereof, and thereby make the matter as clear as possible and as simple as possible for presentation to the jury in court. And that required a tremendous amount of time. I can't apportion it.

Q. I imagine it might have been as much as a half of the 2,000 hours, might it not?

A. It might have been.

Q. Or perhaps more?

A. We not only had to analyze the records of the plaintiff to try to determine, because of the extensive photostating that the defendant made of the plaintiff's records, just what the defendants might be intending to present from those records, but we had the situation where the company was in virtual bankruptcy, we had to get those records out, and then the responses to interrogatories, which we addressed to the defendants, were neither complete nor clear as to the facts which they were giving.

Q. You had no one to help you in this, did you, Mr. Irwin? A. Yes, I did. [4846]

Q. Who did you have?

A. I had a Mr. Smith, who was working as a bookkeeper and accountant for Winckler & Smith, or for the trustee, I should say, not for Winckler & Smith; I had my associate, Mr. Walker, who was trustee; and we necessarily occupied a tremendous amount of time of Mr. Dixon in going over these matters.

Q. I notice both you and Mr. Dixon in your affi-

(Testimony of Harry M. Irwin.)

davits say that you were handicapped because you had no investigator. A. We were.

Q. If you had had an investigator here, how much of the 2,000 hours that you put in would he have put in, do you suppose?

A. I would say there would be practically no difference, because in preparing evidence of the kind required in this case an investigator would have only served to accumulate data, but it was necessary for an attorney to go through all of that data, because no investigator would be able to pick out this item here, there, and yonder, either in the minutes of the corporation or in the bookkeeping items, and evaluate that and determine what facts of those would be introduced in evidence, and what were not material or important. Therefore, the attorney had to do all the work. Whereas, if you have an investigator, he can simply bring the data to your office, but still you have to do the [4847] work.

Q. But what you are saying, then, is if you had had additional help, additional investigators, that would not have reduced the amount of hours that you put in; is that correct?

A. No. I think my answer to that is that if we had had additional investigators, we would have had more information as to the facts. But we, nevertheless, would have had to spend as much time as either Mr. Dixon or I did in evaluating that testimony and in determining just what portion of it is relevant and material and should be used.

(Testimony of Harry M. Irwin.)

and what might be disregarded as being of little importance.

Q. By the way, Mr. Irwin, do you know whether or not there is a going rate, per diem rate, or an hourly rate, in Los Angeles for lawyers who try antitrust cases?

A. I have an impression that the Bar Association has—or some group has fixed a standard or a minimum rate; but I do not understand, even, in fixing that rate, that they undertake to apply it to a particular attorney's practice or particular litigation.

In my own matters I have always based—I have practically disregarded the hours spent.

Q. What is this rate that you have just mentioned that has been fixed by the Bar Association?

A. I don't know. People have talked about $250 or $500 per diem in court.

Q. Is that what the Bar Association talks [4848] about?

A. I am not informed. I don't know. I don't know that the Bar Association has actually formulated any such schedule.

Q. I thought you said that the Bar Association had formulated some minimum schedule.

A. I evidently did not make myself clear. I said in general terms that I had heard that the Bar Association or some group of lawyers, and I did not undertake to identify them, and I do not know, but I have heard of such a schedule. In fact, I think the Los Angeles Daily Journal some several years

(Testimony of Harry M. Irwin.)

ago printed a schedule of minimum charges for attorneys to make for specified services.

Frankly, I never paid any attention to it.

Q. If there is a going rate in the Los Angeles area for trial lawyers who specialize in the trial of antitrust cases, you don't know what it is?

A. I never heard of such a rate.

The Court: For your benefit, Mr. Fowle, not being a resident of our bright and glorious state, it is my understanding that the L. A. Bar itself has never prepared one of these fee schedules, but that the Bar Associations of various communities surrounding Los Angeles, like Inglewood, Long Beach, San Fernando Valley, a number of the smaller bar associations, have published from time to time tentative lists of suggested fees, so much for a corporation, so much for defense of a criminal trial on a per diem, a civil trial, and entirely [4849] suggested fees. There are minimum fees. I think that is about the picture.

Mr. Fowle: Your Honor, I might say, and I say this quite respectfully, I am not asking these questions, really, so much for my information as I am for the record.

The Court: That is one reason why I thought I would say that.

I think my statement is fairly accurate. I don't think the L. A. Bar ever did. I might be subject to correction there.

I have never seen one yet where they had listed anything about antitrust matters.

(Testimony of Harry M. Irwin.)

It generally talks about civil, criminal, and so forth.

Q. (By Mr. Fowle): Mr. Irwin, in your affidavit you say that you believe that $350,000 is a fair fee for plaintiffs' attorneys in this case.

A. That is true.

Q. How did you compute that figure?

A. Well, I computed it on the basis of similar charges, somewhat in proportion to charges which I have made in my experience and practice, and charges that I know other attorneys have made; and you will understand that I have testified already that I have not made any charges in antitrust litigation, and consequently I have no experience as to charges made in antitrust matters, except as those charges [4850] might be incidentally referred to in the various cases.

Q. Did I understand you to say that you took into consideration the charges that had been made in similar cases?

A. I said similar cases, but excluded charges in antitrust matters, because I said I had limited experience in antitrust matters.

Q. When you speak of similar cases, what kind of cases do you have in mind?

A. Cases where there is an action for recovery where the service is rendered without any previous fixing of fees on any daily or per diem rate, on a charge of what is a reasonable fee for the services as determined at the end of the litigation.

(Testimony of Harry M. Irwin.)

Q. Are those cases in which there was a contingent fee arrangement?

A. Sometimes there would be, sometimes there wouldn't, but I have taken all of the experience into consideration in arriving at this fee.

Q. Did you take into consideration the fact that the fee in this case would be contingent upon a successful outcome?

A. Only to this extent: If my employment, we will say, in this case—it is hard to imagine, perhaps, but suppose I were employed alone in this case, and had the ability to handle it, as I know Mr. Dixon did handle this case, and at [4851] the conclusion of the case, considering all the facts which we are all acquainted with in this case, I would have fixed my fee at, at least 40 per cent of the entire recovery. That is to say, that I would have fixed the fee at at least $600,000.

Now, I did take that fact into consideration, and I also took int consideration the fact that in my opinion I should not consider that this case was actually, if not literally, on a contingent basis. So I undertook to eliminate the contingency from my estimate of the fee in this case, so that I determined whereas if this case had been on a contingent basis a reasonable fee would have been $6,000 as a minimum.

Q. $600,000?

A. $600,000. 40 per cent of the entire recovery of one million and a half. I reduced that amount down to $350,000, and on that basis, as well as other

(Testimony of Harry M. Irwin.)

facts within my knowledge, I concluded that $350,000 would be a reasonable fee to be charged in this action, where the contingency is completely eliminated in estimating the fee. And inasmuch as there is only one attorney fee that can be fixed, it doesn't make any difference whether there is one or more attorneys.

I have made my affidavit and representation that in my opinion $350,000 is a reasonable fee to be allowed in this case.

Q. You take into consideration the amount of the [4852] verdict as trebled, I take it?

A. I told you that that was one of the premises which I considered. I started out with what my fee would have been on the assumption that the recovery was $1,500,000, I took into consideration trebling and the contingency, and knew that the normal fee, according to my basis of charging, and I think the basis of most of the attorneys, would have been on the basis of 40 per cent of the entire recovery. Then I undertook to eliminate those factors as to the trebling, and the recovery, and the contingency, and I came to the conclusion that $350,000 under all the circumstances, as well as I could weigh the matter, would be a reasonable fee.

Q. Do you know of any other antitrust cases, Mr. Irwin, in which a fee has been allowed which is in excess of 50 per cent of a verdict as large as the verdict is in this case?

A. I told you my experience in antitrust matters is limited. I simply am testifying to my own

(Testimony of Harry M. Irwin.)

opinion with the full realization that the court will weigh all opinions and determine what is fair and just.

Q. Did you take into consideration what you may have thought the defendants paid their lawyers in this case?

A. No, not in fixing the fee, although I do think that is somewhat of a criterion. If the defendants paid as much as they have, as I was informed—of course I did not know those facts when I gave my estimate—I was of the opinion [4853] that the attorneys for the defendants had been paid approximately that amount, and I thought the services of the attorneys for the plaintiff would be worth equally that much.

I think the services that the defendants' attorneys rendered in this action were of equal quality and value as the services that were rendered—I mean of the plaintiffs' attorneys were of equal quality and value as the services rendered by the defendants' attorneys, and vice versa, Mr. Fowle. I would say that it works both ways. [4854]

* * *

CLORE WARNE

called as a witness by and on behalf of the attorneys for the plaintiff and trustee, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Clore Warne.

Mr. Reich: Let the record show that Mr. Warne is called as a witness for all attorneys for the plaintiff and trustee.

Direct Examination

By Mr. Reich:

Q. What is your business address, Mr. Warne?

A. 6535 Wilshire Boulevard, Los Angeles.

Q. Are you a member of a firm at the present time? A. I am.

Q. The name of it, please?

A. The firm of Pacht, Ross, Warne & Bernard.

Q. Prior to that name, you were a member of the predecessor firm of what name?

A. Pacht, Tannenbaum & Ross.

Q. Prior to that time?

A. Pacht, Warne, Ross & Bernard.

Q. And how long have you been, yourself, practicing in this community?

A. Since May 1, 1920. [4855]

Q. 1920? A. 1920.

Q. Have you and your firm handled antitrust cases? A. We have.

Q. In this district? A. Correct.

Q. Will you name those that you can remember?

(Testimony of Clore Warne.)

A. There was the defense of a case, Finley vs. Music Corporation of America; there was the prosecution of a case, three cases, as I recall, for Fanchon & Marco, or their subsidiary corporations, I have forgotten the corporate name, one against Warners—all of these were against the major motion picture studios, and Fox West Coast.

Q. May I name them? If I am correct, Fanchon & Marco, the Manchester Theatre, and the Southside Theatre cases, three different cases?

A. Correct.

Q. Incidentally, I was a member of Pacht, Tannenbaum & Ross, was I not?

A. Correct, and the prior firm of Pacht, Warne, Ross & Bernard.

Q. And I handled some of those antitrust cases in conjunction with your office, did I not?

A. That is correct; you very largely handled them after the initial case, and worked actively upon the initial case? [4856]

Q. Go on with this list.

A. I believe there were two cases which were brought for drive-in theatres.

Q. Pacific Drive-In?

A. Pacific Drive-In Theatres was one of them. I have forgotten whether that was the corporate name of the second one. It may have been. There were two cases.

Q. The other one was San Pedro against Warner Bros.?

A. It involved a drive-in situation, as I recall.

(Testimony of Clore Warne.)

There was an appearance—I was thinking of the defense of an action—in which Fanchon & Marco were charged as defendants in one of the cases, but I think there was a dismissal as to that.

Q. One moment, Mr. Warne. In the Cal-Pac or the Pacific Drive-In cases, do you remember how many different plaintiffs there were and how many different drive-ins were involved?

A. I do not know, except that there were a number. I know that it presented an involved—quite an involved situation then existing with reference to procuring product for drive-in theatres in competition with, shall we say, non-drive-in movie theatres.

Q. Pacific Drive-Ins was the single largest drive-in enterprise in this community, was it not?

A. I believe it was at that time. [4857]

Now, then, there was another case that we brought, which involved the Richfield Oil Company.

Q. Was that Henry Munson against Richfield?

A. Yes, Munson. Which involved a private lawsuit against Richfield, both for injunctive relief, which, as I recall, was successful at the injunctive level, and for damages, and it was settled at the damage level under one of their lease contract operations.

Q. Mr. Dixon, as a matter of fact, was attorney for the government in the basic case which the government brought, and on which this Munson case was founded in part, isn't that true?

A. I didn't recall that he was that counsel, but

(Testimony of Clore Warne.)

I remember that there was a pilot case decided by Judge Yankwich, as I recall, which went to the Supreme Court.

Q. I have always thanked Mr. Dixon for that fee.

Mr. Dixon: Thank you.

The Witness: I believe that covers the antitrust phase of the litigation in which I have any familiarity.

Q. (By Mr. Reich): You, yourself, despite your modesty, Mr. Warne, were actively engaged in all those cases, were you not?

A. Yes, I was somewhat considered in those cases.

Q. As a matter of fact, you were my senior in those cases? [4858] A. Correct.

Q. Have you read Mr. Dixon's affidavit of February 13th?

A. That is the affidavit filed here in support of the application for fixing fees?

Q. Yes. A. Yes, I have.

Q. Did you hear Mr. Dixon's cross-examination, that is, the cross-examination of Mr. Dixon?

A. I did.

Q. And have you read the affidavit of Mr. Irwin, dated the same date, February 13, 1956?

A. I did.

Q. And did you hear the cross-examination of him? A. I also heard that.

Q. Did you read my affidavit of February 12, 1956? A. I did.

(Testimony of Clore Warne.)

Q. Did you examine my time sheets in support of that affidavit? A. I did.

Q. Have you examined the pleadings in this case, both the original pleadings and as they were amended, and the answers to the amended complaint? A. I did.

Q. Mr. Warne, have you formed an opinion as to the reasonable value of the services that were rendered by the attorneys [4859] for the plaintiff and the trustee? Either yes or no.

A. Considering another factor, which has been expressed to me and I believe was included in part in the affidavit——

Mr. Fowle: May we have this answer confined to yes or no so I may make an objection?

Mr. Reich: Again, we are dealing with a lawyer witness.

The Court: The question is, do you have an opinion, and you want to add another fact before you answer yes or no?

The Witness: That is correct.

The Court: What is this additional fact?

The Witness: The additional factor is, and I am not sure that it is recited in that form in the affidavits—that is, that there was a verdict rendered here in favor of the plaintiff in the sum of $500,000.

The Court: Yes. I don't know whether the affidavits you refer to, either, disclose the fact that this case started to trial before a jury on December —10th, was it?

Mr. Reich: Yes, it does.

(Testimony of Clore Warne.)

The Witness: Mr. Dixon's affidavit recites those facts.

The Court: Now, do you have an opinion?

The Witness: My answer is yes.

Q. (By Mr. Reich): What is that opinion?

Mr. Fowle: Objection, if the court please. I believe, as your Honor indicated to us the other day, that the proper way to proceed here is to propose a hypothetical question to [4860] the witness, and no such question was posed, and the questions that have been asked are so far from containing anything remotely approaching the various factors and problems here, that it is not even possible for us to point out what has been omitted, and what may have been included that shouldn't have been. The omissions are, of course, obviously great, and we object to this question and to the witness answering it on that ground.

The Court: I didn't understand that I had limited you to ask a hypothetical question. The record on which this witness is basing his opinion is his inspection of these pleadings, as amended, and the answers thereto, the time involved in trial, the affidavits of Mr. Dixon, Mr. Irwin and Mr. Reich, and the cross-examination which he heard, which is all in the record.

What other major elements would there be? It seems to me this is a matter for you to cross-examine on.

The objection is overruled.

The Witness: The question, as I understand it,

(Testimony of Clore Warne.)

is what in my opinion is the reasonable value of the services rendered?

The Court: By the attorneys.

The Witness: By the attorneys, yes. I would say the reasonable value of those services would be $400,000.

Q. (By Mr. Reich): What are the factors, Mr. Warne, that give rise to that opinion, that you considered in making that [4861] opinion?

A. I considered a number of factors.

Factor (1), the problems that are involved when an attorney is presented by a client with a set of facts in which he indicates that he requires the assistance of an attorney in order to secure legal relief, if possible, and which the attorney at that time is required to consider, as the problem is stated to him by the client and by way of an investigation, and the particular skill and ability that is shown in approaching and solving that problem, or at least in approaching and presenting a solution to that problem, and then undertaking the responsibility of a lawsuit in aid of the client in that type of situation. Having in mind that in the first instance what is required is the ability to see a basis for relief, and for damages, if damages are allowable that can be recovered in a lawsuit on behalf of the client, and then engaging in that lawsuit.

I consider, also, secondly, the nature and character of services peculiarly required to be rendered in connection with the prosecution of an action, I

(Testimony of Clore Warne.)

mean an action such as here, where, as I read the pleadings, and the issues presented by the pleadings, it is not a pattern type of action. By that I mean the type of action where, shall we say, you follow the general rule laid down in the Paramount case, or where there is a prior government decision in a given case, [4862] which, shall we say, lays the law, or which can be used as a basis, as a fact and law basis, as I understand it, not necessarily for recovery, but at least to develop a theory in the action. And the particular skill and ability which is required in order to, shall we say, make a case for the client by the bringing of a lawsuit and using the processes of discovery, and of developing facts which are permitted under the procedure of the federal court, and in antitrust cases.

Thirdly, the particular skill and ability of trial counsel. And if I may say so, the eminence of trial counsel who conducted the trial of the action.

I will say, also, that in all of these, including trial and preparation, and the initial work, the matter of time which such a diligent and qualified counsel, or qualified counsel, rather, working diligently, would be required to devote in connection with the rendering of such services.

I would consider, also, the fact that, as is indicated here—the, shall we say, speculative character of the litigation, having in mind the fact, again, that this is a type of case where there was no pattern for recovery and where, shall we say, the case had to be made from the facts elicited and de-

(Testimony of Clore Warne.)

veloped in the particular lawsuit, and the facts as found very largely in connection with the preparation for the trial of the lawsuit.

I should have mentioned, also, not as a separate item, [4863] but in connection also with the trial of the case and the preparation of the case for trial, the work involved in connection not only with the fact of discovery, but then making the facts discovered available for trial use, which is a very considerable job required in connection with any intricate litigation, and ordinarily, as I understand it—and as I have known the fact to be—this type of litigation is of such a character.

I would consider also as a factor, the next in order, the results in the case, which in this instance involved—resulted in a verdict of damages, as I understand it, of $500,000 for the plaintiff in the action, and which amount is required to be trebled under the statute.

I would consider, also, the fact that in litigation of this kind the matter of attorneys' fees being a part of the penal provisions of the statute is properly to be given consideration on the basis that all of the facts can be considered or should be considered, in my opinion, by the court, in fixing the matter of attorneys' fees, these matters such as I have stated and presented, and should be considered liberally in aid of the attorneys, or rather in aid of the plaintiff who brings the action and who procures attorneys in such an instance to bring the action and prosecute it to successful judgment.

(Testimony of Clore Warne.)

Those are the factors which I have considered in connection [4864] with this.

Q. Did you consider, also, Mr. Warne, the nature of the opposition in this case?

My affidavit makes mention of the opposition. Did you consider that factor in making your opinion in fixing the fees?

A. I did, and particularly with reference to the matter of that opposition always making, shall we say, at least, difficult, and even more than difficult, requiring extraordinary services in the preparation and in the trial of the action.

Q. Did you consider as one of the factors the inability of the plaintiff to give a retainer to its counsel?

A. I considered the fact that there was no retainer given in this instance, as I understood the fact to be, and that the employment was not on the basis of a retainer.

Q. Did you give any consideration to the inability of the plaintiff—that inability being caused as alleged by the acts of the defendants charged?

A. Putting it exactly that way——

Q. No. Put it any way you like.

A. No, I cannot say that I considered that as a factor directly.

Q. Do you consider it a factor, now that I bring it to your attention? [4865]

A. I would consider that under the general first category that I mentioned, namely, part of the man's problem is that he was met with a commer-

(Testimony of Clore Warne.)

cial situation, which as stated in the complaint was in effect putting him out of business, and as I understood it, it eventually did so.

Q. Would you put under that same factor the different positions of the parties, that is, the position in the community of the plaintiff, and the position in this case of Sunkist—is that a consideration, sir?

A. Only as it would come under the difficulties of the problem overall presented.

Q. It is easier to find a lawyer for Sunkist than it is to find a lawyer for Winckler & Smith, which is my question?

A. I think counsel would agree to that.

Mr. Fowle: If the court please, I wish to object to the manner in which counsel is leading this witness. It is perfectly obvious that Mr. Warne knows the basis for his opinion, and I don't think it is necessary for counsel to put words in his mouth.

Mr. Reich: I withdraw the question, sir.

The Court: All right. You may cross-examine.

Mr. Fowle: Your Honor, I wonder if we might have a five-minute recess before we commence the cross-examination.

The Court: Let's make it rather short, because we may have to have another one later. [4866]

Mr. Fowle: It will be a short one.

The Court: Step down, Mr. Warne.

(Recess taken.)

The Court: Proceed.

(Testimony of Clore Warne.)

Cross-Examination

By Mr. Fowle:

Q. Mr. Warne, your firm, I take it, has had some experience with treble damage suits under the antitrust law? A. Yes.

Q. Do you know of a case in which in a treble damage suit under the antitrust laws that a court has awarded plaintiffs' attorneys in a successful case for the plaintiff attorneys' fees amounting to 80 per cent of the verdict?

A. If you want to go into the history of all these cases, I do not know of any, put exactly in that fashion.

Mr. Fowle: That is all I have.

The Witness: But, wait. I have not finished my answer, sir.

Q. (By Mr. Fowle): All right.

A. I do know of a case in this district that I assisted in trying before Judge McCormick—I mentioned the Finley case, the Music Corporation of America, where a judgment was awarded in favor of the plaintiff—correction—a verdict was returned in favor of the plaintiff in the action, [4867] and whereupon a motion for a new trial the judgment was vacated, and at the same time an application to fix attorneys' fees—the judgment was vacated insofar as the plaintiff's recovery was concerned, on the ground that no recoverable damage could be shown, but where the court made an allowance of $17,500 for attorneys' fees.

(Testimony of Clore Warne.)

Q. How much was that?

A. The amount of attorneys' fees was $17,500. This was for a short trial, I think, of five or seven days, or thereabouts, a case tried before Judge McCormick to a jury.

The Court: And a judgment had been entered on the verdict, but on the motion for a new trial the judge set aside the judgment?

The Witness: Correct, in favor of the plaintiff as to damages, but allowed the plaintiff attorneys' fees in that amount.

The Court: Was there any type of relief still remaining to plaintiff?

The Witness: There was none. There was no relief in the case at all, whatever. There was no injunctive relief—while it was prayed for originally, there was no injunctive relief sought, nor before the court at any time.

The Court: What theory did Judge McCormick base the award on?

The Witness: Upon the theory that this was an action in [4868] which, by reason of the jury's verdict, the fact of violation of the antitrust law had been proved, although there could be no proof of damages, that is, the evidence on damages was insufficient to support the verdict, nevertheless, by reason of the fact that there is a penalty provision in the statute in favor of the plaintiff prevailing in an action of this kind, that the plaintiff should be allowed attorneys' fees for services rendered. That was the theory that he announced.

(Testimony of Clore Warne.)

Q. (By Mr. Fowle): Was there an appeal in that case?

A. There was an appeal—we appealed that ruling of Judge McCormick.

The Court: Were you on the defendant's side?

The Witness: We were, sir.

The Court: What happened?

The Witness: We settled the matter before it was determined on appeal.

Q. (By Mr. Fowle): It never came before a Court of Appeals?

A. It was not decided by the Court of Appeals.

Mr. Fowle: Thank you, very much.

Mr. Reich: There is another case, is there not, Mr. Warne, where the amount of attorneys' fees was 1,500 per cent of the amount of the verdict? That was in Judge Westover's court in the Banning case, where the jury came in with a [4869] verdict——

Mr. Fowle: Are you testifying, Mr. Reich?

The Witness: I read of that fact, and I think the judge read it, also.

The Court: That is a fact of which I can take judicial notice. All someone has to do is call it to my attention. Do you agree?

Mr. Fowle: Yes.

The Court: I had reference to it in the brief.

What was the amount of the verdict?

Mr. Reich: $1,000. And Judge Westover allowed counsel $15,000.

The Court: How long did it take to try?

Mr. Reich: Less time than this one, this case that was tried here. I think it took seven [4870] weeks.

* * *

CHARLES E. BEARDSLEY

called as a witness on behalf of the defendants, being first previously duly sworn, testified as follows:

The Witness: My name is Charles E. Beardsley.

The Court: I never cease to be amazed at the ingenuity of lawyers. The defendants in this case had found every opinion that I had ever written where I had said anything that in any way pertained to the issues in this case. I complimented them before, and I will compliment them again. Mr. Reich calls Clore Warne as a witness, an old friend of mine that I am well acquainted with; the defendants call Charles Beardsley, whom I have known since——

The Witness: 1927.

The Court: He and I got by the bar at about the same time.

You are on an equal basis. [4871]

Mr. Fisher: Your Honor, may I say for the record, that at the time I interviewed Mr. Beardsley with reference to becoming a witness, I didn't know that he was a particularly close friend of yours.

The Court: Well, you can't blame the court for having a few friends now and then.

(Testimony of Charles E. Beardsley.)

Mr. Fisher: I am sure that that friendship will neither influence Mr. Beardsley nor your Honor.

The Witness: I admitted the friendship. If that is guilt by association, I am guilty. I also said it would make no difference to this judge no matter how good a friend the witness was of his. And I think I see Mr. Warne nodding his head.

Mr. Warne: I may agree, for the record.

The Court: That is true.

Go ahead.

Direct Examination

By Mr. Fisher:

Q. Mr. Beardsley, what is your occupation?

A. I am an attorney at law, licensed to practice in California and in this District, and in the United States Supreme Court.

Q. How long have you practiced?

A. Since October, 1927. [4872]

Q. Where did you obtain your legal education?

A. Stanford University.

Q. Are you a member of a firm?

A. Yes. Beardsley, Hufstedler & Kemble.

Q. How long has that firm existed?

A. The firm has existed in name since I was spending most of my time away from the office in 1951. It has existed as a true partnership since January 1st, 1955.

Q. Prior to that time you practiced as an individual, is that correct?

A. Yes, I began with my father, John Beards-

(Testimony of Charles E. Beardsley.)

ley, in 1927, was with him until 1934 when he went into public office, then I practiced in association with George P. Adams until 1939, and then I practiced individually and with employees, accumulating up to two employees, who are now my partners, as I have stated, for the period that I stated.

Q. I believe you stated the courts to which you are admitted?

A. I think so. All courts in California, this District, the United States Supreme Court, the Court of Claims. I never appeared there except to be admitted, I might confess.

Q. Have you been active in state and local bar activities? A. Yes.

Q. What offices have you held? [4873]

A. I was chairman of the junior committe, junior barristers—that taxes my memory, that was in 1928; I was on various committees of the Los Angeles Bar Association and of the State Bar; I was for five years a member of the committee of bar examiners of the State Bar, from 1941 to '46, chairman the last year; I was for three years a member of the Board of Governors of the State Bar, and president in the years '52 and '3, I believe.

Q. What has been the general nature of your practice?

A. Mine has been a general civil practice, practically no criminal work; of recent years, a good deal of trial work for other attorneys, as well as for my own clients, with considerable probate work.

(Testimony of Charles E. Beardsley.)

real estate law. No antitrust work.

Q. Would you say that you have more or less specialized in trial work?

A. In the last six or eight years I would say that that has been the major part of my work.

Q. Are you a fellow of the American College of Trial Lawyers? A. Yes, I am.

Q. For how long have you been?

A. I would say three or four years. I am not sure.

Q. Practically since its organization?

A. About a year after its organization. [4874]

Q. You say you have not specialized in antitrust work?

A. No; I say I have never handled an antitrust matter.

Q. Would you give us an indication of some of the more important trials in which you have participated?

A. Each of them to my client has been the most important trial that ever came along. Just now I seem to be in the garbage business. Atkinson vs. the County of Los Angeles.

I would say that my clients largely are individuals. I have no large corporate retainers. I don't represent any insurance companies. Let's say I am a people's lawyer. The cases are more for individual clients, rather than for large organizations.

Q. Are you generally familiar with the charges made by attorneys in this locality, would you say?

A. Yes, sir, I think I am quite familiar. Very

(Testimony of Charles E. Beardsley.)

much more so since my time on the Board of Governors, which handles disciplinary matters, and since my service on the arbitration committee of the Los Angeles Bar Association, and as chairman, as I recall, of that committee which settles disputes between lawyers and clients, and particularly because of my interest in public relations of the profession, which are very, very profoundly affected by the matter of the fees charged by lawyers. [4875]

Q. Are you familiar with the charges in more important and complicated cases, also?

A. I think I am, yes.

Q. Mr. Beardsley, have you examined the files in this case?

A. I have gone through most of the files. I was advised that the clerk's files were away because of some appeal, and I examined, with the court's permission, in the absence of the judge, in the anteroom of his chambers, the court's duplicate copies of the pleadings. There are about some 12 file folders. I haven't finished going through them. I have gone through all of the pleading folders, and the various motions, the interrogatories, the discovery proceedings, the motions under various Federal civil rules, and there are some miscellaneous files which I have not examined fully. Now, I don't mean that I have gotten outside of this lawsuit, because I first was approached by you on Sunday last, and have done this at odd times since then as I was able to take time.

(Testimony of Charles E. Beardsley.)

Q. Have you examined the answer which we filed to the plaintiff's application?

A. Yes, I have read the affidavits of the three attorneys for the plaintiff, and your answer.

Q. You have been in court today and have heard Mr. Warne's testimony, and the other testimony given? [4876]

A. Yes, sir, with the exception of brief runs out to the telephone to try to keep the store going while I was here, I have heard practically all of it.

Q. Mr. Beardsley, I would like to state a hypothetical question to you.

And, your Honor, I don't think it will take two hours to read.

The Court: Was that my prophecy? [4877]

Q. (By Mr. Fisher): Mr. Beardsley, I want you to assume a hypothetical state of circumstances. I want you to assume that in the year 1951 a corporation by the name of Winckler and Smith Citrus Products Company, which corporation will be hereafter referred to as Winckler & Smith, was engaged at Anaheim, California, in the business of processing citrus fruit into citrus fruit juices, particularly single-strength orange juice, and of selling such products in intra and interstate commerce. Assume that during that year a non-profit co-operative agricultural producers association known as California Fruit Growers Exchange whose name was later changed to Sunkist Growers, Inc., and which will be hereafter referred to as Sunkist, sold products citrus fruit to processors.

(Testimony of Charles E. Beardsley.)

Assume that during that year Sunkist had a wholly-owned subsidiary known as Exchange Orange Products Company, which will be hereafter referred to as Exchange Orange, which was engaged in the business of processing citrus fruit into citrus fruit products, including single-strength orange juice, and that it marked such products through Sunkist. Assume that in that year Exchange Orange made a written processing contract with a corporation known as TreeSweet Citrus Products Company, which will be hereafter referred to as TreeSweet, and another one with the E. A. Silzle Corporation, which will be hereafter referred to as Silzle. Assume that under each of these contracts TreeSweet and Silzle, respectively, were to [4878] process oranges for Exchange Orange, and were to be paid their processing costs for manufacturing canned single-strength Valencia orange juice and that the contracts provided for the purchase by these two concerns of said canned single-strength Valencia orange juice so processed at Sunkist's market price for such juice at the time of purchase, less certain discounts. Assume that with respect to TreeSweet similar contracts had been made in prior years. Assume that on one or more occasions in the year 1951 Winckler & Smith had requested of Exchange Orange and Sunkist a similar processing contract and assume that no such contract was given to Winckler & Smith. Assume that Winckler & Smith subsequently claimed that it was unable to buy or acquire

(Testimony of Charles E. Beardsley.)

oranges from Sunkist or Exchange Orange or anyone else at prices which would enable it to process the oranges into single-strength orange juice and to sell the juice in competition with Sunkist, TreeSweet and Silzle.

Assume that prior to February 1, 1952, Winckler & Smith retained an attorney officing in Beverly Hills, California, whom we will call Bernard Reich, to pursue claimed violations against Sunkist, Exchange Orange and others under Federal and State antitrust laws. Assume that on or about January 15, 1952, said Reich sent a letter to Sunkist enclosing a copy of a proposed complaint setting forth said claims. Assume that on February 1, 1952, through said attorney, a complaint for equitable relief and for treble damages under the Federal and [4879] State antitrust laws was filed in the District Court of the United States for the Southern District of California, Central Division, and was assigned to Judge Byrne. Assume that said complaint was prepared by said Reich, was eighteen pages long, and that Winckler & Smith was the plaintiff and that Sunkist, Exchange Orange, Exchange Lemon Products Company, an affiliate of Sunkist hereinafter referred to as Exchange Lemon, and TreeSweet, together with a number of John Doe defendants, were named as defendants. Assume that said complaint set forth five causes of action, (1) an alleged conspiracy among the defendants to restrain trade and commerce in violation of Section 1 of the Sherman Antitrust Law, (2) an al-

(Testimony of Charles E. Beardsley.)

leged monopolization, and attempt to monopolize and conspiracy to monopolize the California citrus fruit juice industry, in violation of Section 2 of the Sherman Antitrust Law, (3) an alleged violation of the Robinson-Patman Act, (4) an alleged violation of the State of California Cartwright Act, and (5) an alleged violation of the California Unfair Trade Practices Act. Assume that said complaint charged that the said alleged violations of law caused said Winckler & Smith damage in the amount of $800,000, and asked for treble said damage, and for injunctive relief. Assume that the claims of plaintiff were novel and complicated. Assume that Sunkist and Exchange Orange employed the law firm of Farrand, Fisher & Farrand of Los Angeles to defend them; that Exchange Lemon employed the law [4880] firm of Clayson, Stark & Rothrock of Corona and the firm of Pope & Ballard of Chicago and Washington, D. C. (the Washington office of said firm being known as Pope, Ballard & Loos), to defend it, and that TreeSweet employed the law firm of O'Melveny & Myers of Los Angeles to defend it. Assume that stipulations and orders extending the time of said defendants to plead to and including March 25, 1952, were entered into. Assume that said defendants moved to dismiss or strike the complaint or portions thereof for a more definite statement, and filed in that connection a thirty-page memorandum of points and authorities and that said Reich prepared and filed

(Testimony of Charles E. Beardsley.)

a 36-page memorandum of points and authorities in opposition to said motion.

Assume that on March 15, 1952, said Reich on behalf of plaintiff prepared and filed interrogatories directed to defendants consisting of some eight pages, containing twenty-four questions with many subdivisions, and that defendants other than Sunkist filed objections to many of the interrogatories. Assume that a hearing was had before Judge Byrne on defendants' motion to dismiss, to strike and for a more definite statement and on said objections to interrogatories which lasted an entire day, and that said Reich appeared and argued on behalf of plaintiff at said hearing, and that defendants' motion to dismiss said complaint was denied, their motion to strike was granted only in part, and their objections to said [4881] interrogatories granted only in part. Assume that said Reich prepared, served and filed the Court's order thereon, consisting of four pages.

Assume that on or about March 20, 1952, plaintiff filed a petition under Chapter X of the Bankruptcy Act in said District Court which matter was assigned to the Honorable James M. Carter, Judge, and that in said proceedings he appointed a trustee, whom we shall call Ronald Walker. Assume that Ronald Walker as such trustee employed an attorney to represent him whom we shall call Harry M. Irwin. Assume that Mr. Irwin appeared at said hearing on said motion to dismiss and filed a petition for leave for said trustee to intervene in said

(Testimony of Charles E. Beardsley.)

antitrust action, which petition Mr. Irwin had prepared. Assume that said petition was granted a few days later without opposition, and that Mr. Irwin prepared, served and filed a two-page order thereon.

Assume that on or about May 26, 1952, Sunkist and Exchange Orange served and filed their answers to plaintiff's interrogatories consisting of about 115 pages including exhibits, and Exchange Lemon served and filed its answer to plaintiff's interrogatories consisting of approximately 34 pages, and TreeSweet served and filed its answers to plaintiff's interrogatories consisting of 14 pages, and that each of said answers were reviewed by Mr. Reich.

Assume that on or about May 26, 1952, Sunkist and Exchange [4882] Orange served and filed their answer to plaintiff's complaint consisting of 16 pages, Exchange Lemon served and filed its answer on said day consisting of nine pages, and TreeSweet served and filed its answer to said complaint consisting of nine pages and that each of said answers were reviewed by Mr. Reich.

Assume that on June 16, 1952, Sunkist, Exchange Orange and TreeSweet served and filed interrogatories propounded to plaintiff consisting of 79 interrogatories, and that in July, 1952, Exchange Lemon served and filed a motion for discovery and the production of documents of plaintiff under Rule 34 of the Rules of Civil Procedure together with supporting affidavits. Assume that Mr. Reich prepared, served and filed a statement in opposition

(Testimony of Charles E. Beardsley.)

to said motion, together with affidavits in support thereof and memorandum of points and authorities consisting of 26 pages, and prepared, served and filed objections to said interrogatories and affidavits and memorandum of points and authorities consisting of approximately 15 pages.

Assume that Sunkist, Exchange Orange and Tree-Sweet served and filed an answer to said objections to their interrogatories consisting of 20 pages and that Exchange Lemon served and filed a reply memorandum in opposition to said statement consisting of 11 pages, all of which were reviewed by Mr. Reich.

Assume that said discovery motion and said interrogatories came on for hearing before Judge Byrne on September 8, 1952, and Mr. Reich and Mr. Irwin attended said hearing which [4883] lasted a full court day, and opposed the granting of said motion and said interrogatories. Assume that said court sustained plaintiff's objections to said interrogatories, without prejudice to later renewal, and granted said discovery motion in the main. Assume that Mr. Reich and Mr. Irwin prepared and filed objections and supplemental objections to the proposed order and that the discovery order was made and entered.

Assume that plaintiff by Mr. Reich and Mr. Irwin prepared, served and filed notice of motion directed to Sunkist and Exchange Orange requesting further answer to two interrogatories, and that this was opposed by said defendants and Mr. Reich and

(Testimony of Charles E. Beardsley.)

Mr. Irwin filed a reply to the memorandum of said defendants in opposition to the motion, and that said motion was heard on March 8, 1954, at which time the Court granted the motion with respect to the answering of one of said interrogatories and that Mr. Reich and Mr. Irwin attended said hearing. Assume that defendants Sunkist, Exchange Orange and Exchange Lemon filed a motion for inspection of documents, that Exchange Lemon filed a motion for further answers to its interrogatories, that plaintiff filed a motion to suppress Exchange Lemon's interrogatories and a motion directed to Sunkist and Exchange Lemon to produce documents, and that all of plaintiff's motions were prepared by attorneys Reich and Irwin, and that they attended the hearing on said motions on March 8, 1954, before Judge Carter, the case having been transferred [4884] on February 2, 1954, to Judge Carter on account of the illness of Judge Byrne, at which time said matters were presented, resulting in the granting of the motion of defendants Sunkist, Exchange Orange and Exchange Lemon for inspection in the main, the granting of Exchange Lemon's motion for further answers to interrogatories in the main, and that plaintiff's motion to suppress interrogatories directed to it was denied, and that the hearing on the motion of plaintiff for production of documents was continued until March 11, 1954, and that conferences were had between attorneys for plaintiff and counsel for defendants prior to said continued date, and that

(Testimony of Charles E. Beardsley.)

on said continued hearing at which Mr. Reich and Mr. Irwin were present disposition was made of the motions, and that plaintiff's motion was granted in the main.

Assume that Mr. Reich and Mr. Irwin prepared, served and filed orders granted by the Court to the plaintiff at said hearing, and that objections to the form of said orders were interposed by the defendants, and that a supplemental order was made thereon also prepared by Mr. Reich and Mr. Irwin. Assume that the defendants took one deposition, that of the president of the plaintiff, and that said deposition was taken in Corona on two different days, and that Mr. Reich and Mr. Irwin attended the taking of the deposition. Assume that the plaintiff took the depositions of six persons and that some of the depositions so taken took an entire day, and assume [4885] that Mr. Reich handled the taking of these depositions.

Assume that extending over a period of approximately one year from time to time there were conferences participated in by Mr. Irwin and on several occasions by Mr. Reich, exploring the possibility of settlement of the action, but that no settlement was effected.

Assume that the plaintiff made a separate settlement with defendant TreeSweet, resulting in an order dismissing said defendant, and that shortly thereafter Mr. Reich asked leave of the Court to be relieved as counsel for the trustee and that he

(Testimony of Charles E. Beardsley.)

was so relieved, the order thereon being made on or about October 11, 1954.

Assume that an attorney whom we will call Mr. William C. Dixon became the attorney for the plaintiff and the intervening trustee on or about September 27, 1954. Assume that prior thereto Mr. Dixon had investigated the action. Assume that shortly thereafter the Court fixed the date of November 15, 1954, as the date for pretrial and the trial date for March 22, 1955, after a conference in his chambers attended by Mr. Reich. Assume that prior to said pretrial hearing date defendants served and filed on November 12, 1954, a 21-page pretrial brief, and that on the afternoon of November 15, a pretrial hearing was held in Judge Carter's chambers attended by Mr. Dixon and Mr. Irwin, and that said hearing was continued until November 18, 1954. A further pretrial hearing [4886] was held in chambers attended by Mr. Dixon, and that said pretrial hearing was further continued until November 24, 1954, and that at said hearing in the Judge's chambers attended by Mr. Dixon and Mr. Irwin the Court granted leave to the plaintiff to file an amended complaint on or before December 24, 1954, and that on or about December 15, 1954, such amended complaint was filed, prepared by counsel for plaintiff. The amended complaint, alleging in essence the same five causes of action as were alleged in the original complaint, named Sunkist, Exchange Orange and Exchange Lemon as defendants, and TreeSweet and Silzle as coconspirators.

(Testimony of Charles E. Beardsley.)

Assume that on or about January 28, 1955, the defendants served and filed a notice of motion, motion and points and authorities to strike portions of the amended complaint, and for a more definite statement. Assume that counsel for plaintiff and intervening trustee prepared, served and filed a brief in opposition to said motion which was replied to by a reply memorandum. Assume that the hearing on said motion was held before Judge Carter on February 14, 1955, that Mr. Dixon and Mr. Irwin appeared for the intervener and that Mr. Reich appeared for the plaintiff, and assume that after argument the motion to strike was denied. Assume that thereafter on February 21, 1955, defendants served and filed their answers to said amended complaint. Assume that Mr. Dixon attended a conference in the judge's chambers regarding the trial date and [4887] that the date of the trial was fixed as June 28, 1955. Assume that counsel were directed by the court to file a statement of issues, which was done. Assume that in the latter part of May further pretrial conferences were held between Mr. Dixon and counsel for defendants and several pretrial hearings were held in court looking toward the limitation of the issues and the entering into a stipulation of fact. Assume that at one of these pretrial hearings Judge Carter revoked the right of Melville C. Williams, one of the attorneys for the then defendant Exchange Lemon and an out-of-state attorney, to appear in the case. Assume that thereafter counsel for defendants

(Testimony of Charles E. Beardsley.)

moved to have attorneys, whom we will call Ferris E. Hurd and Thomas C. Strachan, Jr., to appear in the action, and that such motion was heard on July 11, 1955, and that Mr. Dixon attended said hearing and that at said hearing the court fixed the trial date as November 15, 1955. Assume that the court directed Mr. Dixon to prepare findings of fact and conclusions of law and the order revoking the special admission of Melville C. Williams, and that he did so prepare the same and they were filed on July 27, 1955. Assume that Mr. Dixon prepared a proposed stipulation of facts to which counsel for defendants had objections, and that there were several letters written by Mr. Dixon to Mr. Hurd with reference to the terms of this proposed stipulation of facts. Assume that at various times during the summer Mr. Dixon and [4888] Mr. Irwin made an examination of certain of the records of defendants Sunkist, Exchange Orange and Exchange Lemon, and that in that connection they made several trips to Corona and Ontario, each of a day's duration. Assume that Mr. Dixon and Mr. Irwin had a number of conferences during the summer and fall of 1955 with counsel for the defendants regarding the production of documents and the assembling of material. Assume that on or about October 20, 1955, the court granted permission to Mr. Hurd and Mr. Strachan to appear on behalf of all the defendants. Assume that on October 21, 1955, a conference was held in Judge Carter's chambers, participated in

(Testimony of Charles E. Beardsley.)

by Mr. Dixon, Mr. Irwin and Mr. Reich, at which further pretrial matters were discussed.

Assume that the attorneys for plaintiff on the same day served and filed a trial brief of some 35 pages in length, and that on the same date a formal substitution was filed substituting Mr. Dixon and Mr. Reich in the place of Mr. Reich as attorneys for the plaintiff, with Mr. Dixon being designated as the chief counsel for the plaintiff and intervener.

Assume that on November 3, 1955, defendants moved for a continuance for the reason that plaintiff had still not furnished all of the records which it had been ordered to produce and that this motion was denied. Assume that on the same occasion when Mr. Dixon stated that he had been called to Washington to testify before a Senate committee the trial [4889] was reset for November 29, 1955.

Assume that on November 25, 1955, the defendants filed a trial memorandum which was reviewed by the attorneys for the plaintiff and intervener. Assume that on the same date there was signed a stipulation of facts which had been prepared by Mr. Dixon. Assume also that on November 25, 1955, the Court of Appeals for the Ninth Circuit issued an order staying the trial, so long as this court's order of July 26, 1955, with respect to Mr. Williams' permission to appear on behalf of Exchange Lemon Products Company remained unrevoked. Assume that on November 29, when the case was called for trial, the court continued it to December 8.

(Testimony of Charles E. Beardsley.)

Assume that on the same day the plaintiff moved to dismiss the action as to Exchange Lemon Products Company with prejudice and that the motion was granted, and that on November 30 the court granted the application of Mr. Williams to appear on behalf of the two remaining defendants, Sunkist and Exchange Orange, and that Mr. Dixon attended these hearings.

Assume that at a pretrial conference on December 7 plaintiff voluntarily dismissed its fourth and fifth causes of action, that is, the causes of action based upon the California state statutes, the Cartwright Act, and the Unfair Practices Act.

Assume that because of the illness of Mr. Hurd, chief trial counsel for the defendants, the case was again continued until December 13. [4890]

Assume that the trial commenced on December 13 and lasted until February 8, 1956, when the case was submitted to the jury, there being approximately 33 days of actual trial time and 4,700 pages of reporters' transcript of the trial.

Assume that plaintiff's case consumed approximately 19 days of trial time, during which plaintiff offered the testimony of 12 witnesses and approximately 90 documentary exhibits, many of which consisted of numerous pages.

Assume that the 12 witnesses called by the plaintiff included six officials of Sunkist Growers, Exchange Orange Products Company, and Exchange Lemon Products Company, five of whose depositions had been taken, the President of TreeSweet

(Testimony of Charles E. Beardsley.)

Products Company, the Secretary of E. A. Silzle Corporation, Mr. Winckler, the President of the plaintiff, a Mr. Morgan Ward whose principals, the Independent Fruit Growers Ass'n., had supplied fruit to the plaintiff, Mr. Hodge, who was plaintiff's accountant, and Mr. Walker, the trustee for plaintiff.

Assume that there was extensive cross-examination by defendants of Mr. Winckler and Mr. Hodge.

Assume further that defendants' case consumed approximately nine days and that defendants offered the testimony of some 16 witnesses and introduced approximately 105 documentary exhibits, and offered approximately 65 others [4891] which were rejected.

Assume that the defendants' witnesses included two certified public accountants from Chicago who had made an extensive examination of plaintiff's books and records, four former employees of the plaintiff, a certain Mr. Walker from Florida, two independent California citrus fruit processors, the Secretary of E. A. Silzle Corporation, four brief rebuttal witnesses, and four officials of Sunkist Growers, Exchange Orange Products Company, and Exchange Lemon Products Company.

Assume further that of defendants' witnesses only two, the two accountants, were cross-examined at any length.

Assume that throughout defendants' case there were numerous offers of evidence, oral and docu-

(Testimony of Charles E. Beardsley.)

mentary, which were rejected after considerable argument at the bench or in chambers.

Assume that before defendants closed their case they moved to amend their answer so as to make more definite certain of their defenses and so as to assert that plaintiff had come into court with unclean hands, and that this motion was denied.

Assume that at the close of all of the evidence plaintiff asked leave to file a second amended complaint and that this motion was granted.

Assume that the second amended complaint abandoned the [4892] third cause of action, that is, the cause of action relating to the Robinson-Patman Act, and that it modified the second cause of action so as to eliminate the claim that Sunkist Growers, Exchange Orange Products Company and Exchange Lemon Products Company had attempted and had conspired to monopolize the market for California citrus fruit juices and to substitute the claim that Sunkist Growers, Exchange Orange Products Company, Exchange Lemon Products Company, Tree-Sweet Products Company, and E. A. Silzle Corporation had conspired to monopolize the market for California citrus fruit juice and had succeeded in doing so.

Assume that at the close of plaintiff's case and at the close of all the evidence, defendants moved for a directed verdict and that such motions were denied, without extensive argument from the plaintiff.

Assume that after all the evidence was in, ap-

(Testimony of Charles E. Beardsley.)

proximately three days were spent with the court in chambers on the subject of proposed instructions to the jury.

Assume that closing arguments to the jury consumed approximately a day and that the case went to the jury on February 8 after it had been instructed by the court.

Assume that on Friday, February 10, the jury returned a verdict for the plaintiff in the sum of $500,000.

Assume that Mr. Dixon handled the entire presentation of plaintiff's case, examining all of the witnesses and [4893] alone addressing the court on behalf of the plaintiff.

Assume that Mr. Dixon was assisted throughout the trial by Mr. Irwin.

Assume that Mr. Reich was not present at the trial at all.

Assume that Mr. Hurd of Pope & Ballard made the opening statement to the jury on behalf of the defendants and participated only briefly in the trial thereafter.

Assume that Mr. Strachan of Pope & Ballard became and acted as chief counsel for the defense from and after the time Mr. Hurd was incapacitated because of illness and that he was variously assisted throughout the trial by Mr. Fisher of Farrand, Fisher & Farrand, by Mr. Stark of Clayson, Stark & Rothrock, by Mr. Williams of Pope & Ballard, and by Mr. Fowle of the same firm.

Assume that Mr. Dixon is a member of the Bars

(Testimony of Charles E. Beardsley.)

of California, Ohio, and the United States Supreme Court, that he is a former member of the Supreme Court of the State of Ohio, and that he has been a practicing attorney since 1928.

Assume further that Mr. Dixon was a Special Assistant to the Attorney General of the United States, assigned to the Antitrust Division of the Department of Justice, for a period of approximately ten years commencing in April, 1944, and ending in April, 1954, at which time he resigned from the Department of Justice to enter private practice [4894] in Los Angeles.

Assume further that during this period Mr. Dixon acted as Assistant Chief of the Trial Section of the Antitrust Division of the Department of Justice and as Chief of the West Coast offices of the Antitrust Division of the Department of Justice, with headquarters at Los Angeles.

Assume further that while Mr. Dixon was with the Department of Justice he was chief trial counsel for the government in many litigated and important antitrust cases, including U. S. v. National Lead Company, 63 F. Supp. 513, 332 U. S. 319; U. S. v. Standard Oil Company of California, et al., 78 F. Supp. 850, 337 U. S. 293; U. S. v. Richfield Oil Corporation, 99 F. Supp. 280, 343 U. S. 922; U. S. v. Nat'l City Lines, Inc., et al., 186 F. 2d 562 (certiorari denied, 341 U. S. 916); Local 36 v. U. S., 177 F. 2d 320 (certiorari denied); CO² Fire Equipment Company v. U. S., 197 F. 2d 489 (certiorari denied).

(Testimony of Charles E. Beardsley.)

Assume further that Mr. Dixon entered the instant case for the purpose of preparing and trying the same during the month of September, 1954, and that substantially all of his time since then has been spent in the preparation and trial of this case.

Assume that Mr. Dixon has spent approximately in excess of 2,500 hours of work as an attorney in the course of preparing and trying said case, but that he kept no time [4895] records except for the period from September 27 to December 8, 1954, during which period his records show about 116 hours devoted to the case.

Assume that the actual trial of the case consumed approximately 33 trial days, which does not include Mr. Dixon's time in court in connection with pretrial and other matters directly related to the preparation of the case for trial.

Assume further that Mr. Dixon was without any funds with which to secure proper and investigative assistants in preparing for trial, that the only legal assistance available to him was that of Mr. Irwin, the attorney for the Intervening Trustee, and that it was accordingly necessary for Mr. Dixon personally to do much of the investigative and preparatory work, aided and assisted by Mr. Irwin and the Trustee, Mr. Walker.

Assume further that Mr. Irwin is a member of the Bar of the States of California and Missouri and a member of the Bar of this court and that since 1916 he has continuously engaged in the practice of law in the courts of California and in this

(Testimony of Charles E. Beardsley.)

court, and that throughout this period he has specialized in the practice of civil law in connection with the business transactions of corporations and of individuals and the legal problems and litigation arising therefrom. [4896]

Assume further that because of the lack of funds available to the Trustee for plaintiff, Mr. Irwin was unable to employ investigators and that he was required to and did, personally and in association with Mr. Dixon and with Mr. Walker, examine and digest the voluminous and complex records and facts of the plaintiff and of the defendants pertinent to the issues in this case, and also the questions of law applicable thereto.

Assume further that Mr. Irwin spent in excess of 2,000 hours in the preparation for trial of this action and in the trial thereof, but that he kept no complete or accurate records of his time.

Assume that Mr. Reich has practiced law since 1937 except for 18 months in the armed services and that for more than half of the years of his practice he has specialized in this and allied fields.

Assume that Mr. Reich was sole attorney for the plaintiff from February, 1952, and that he became junior to Mr. Dixon in October, 1954.

Assume further that Mr. Reich became co-counsel for the Trustee in June, 1952, and remained such until he withdrew as co-counsel for the Trustee on October 11, 1954.

Assume further that since October, 1954, Mr.

(Testimony of Charles E. Beardsley.)

Reich has not actively participated in the preparation or the trial of this action. [4897]

Assume that Mr. Reich learned the citrus fruit business, and to that end held approximately fifty conferences with plaintiff's president and others, that he studied the plant at Anaheim on three different occasions and examined into thousands and thousands of documents and records.

Assume further that Mr. Reich made 21 court appearances, three trips to Anaheim, two trips to Corona, participated in the depositions of six of defendants' officers, participated in two sessions of depositions of Mr. Winckler at Corona, prepared 30 motions and petitions and 25 law memoranda, made 425 telephone calls, engaged in 75 conferences, wrote 250 letters, and prepared 150 miscellaneous documents including interrogatories, admissions, memoranda, stipulations, orders and pleadings.

Assume that Mr. Reich was handicapped in his work by the lack of funds with which to prosecute this action and that it was necessary for him to make economical use of his time.

Assume that Mr. Reich's time records show 571 hours spent on this case but that a fair estimate of the actual time expended, properly adjusted to reflect recorded and unrecorded time, is 685 hours.

Assume that Mr. Reich analyzed and digested the pleadings, depositions, interrogatories and admissions, so that he was able to turn organized files over to Mr. Dixon. [4898]

Now, Mr. Beardsley, based on these assumed facts,

(Testimony of Charles E. Beardsley.)

do you have an opinion as to what would be a reasonable amount to be allowed the plaintiff for its attorneys' fees?

A. There are two points that I would like to have you clarify before I answer that. [4899]

Mr. Dixon: Your Honor, may I ju t at this time make an objection solely for the record? I think there are some obvious and unintentional errors in the statement as prepared by counsel, and some things that have been omitted, but I would certainly not want to have the objection sustained so we would have to go over the question again.

Mr. Fisher: Will you point them out to us so that they may be incorporated?

Mr. Dixon: I think, Ross, one of the things you referred to was a motion to amend the complaint. It was to accord to the evidence. That is one of the facts that I caught. There were a few other things of a minor nature that were not included. I didn't make notes of them.

There is certainly nothing in this question relating to the nature of this lawsuit as being one which requires technical training and experience in the problems of this case as being different from others.

I might mention several other things, but I am just pointing those out for the record only.

Mr. Fisher: I will amend my question to include the points that have been made by Mr. Dixon.

The Court: All right, they may be included.

Do you understand the question now?

The Witness: Yes, I do.

(Testimony of Charles E. Beardsley.)

The Court: Do you have anything [4900] further?

The Witness: One of them I think is the same matter that Mr. Dixon had in mind. As I heard the question, at the bottom of page 4, there was some statement to the effect that the claims made were complicated, and I would ask that there be included in the question that the issues involved in the case and the legal problems were complicated and intricate.

That is based upon my examination of the files. I believe they are of that type.

Mr. Fisher: I so ask that the question be amended to include that.

The Court: It may be amended.

The Witness: The other was that I tallied, as you went along, the times you spoke of court appearances, 33 days of court time; does that include the three days discussing instructions, or were those in addition?

Mr. Fisher: It includes the instructions.

The Witness: That also includes the day of argument?

Mr. Fisher: It includes the day of argument. It does not include after the case was submitted to the jury. On two occasions I think we had conferences in chambers with Judge Carter.

The Witness: May I assume, Mr. Fisher, that while you spoke of 33 court days, I tallied the other days that you referred to in court and got something like 12 to 15, and I would assume that there were

(Testimony of Charles E. Beardsley.)

more parts of days, at least, in [4901] other words. 50 somewhere in the neighborhood of 50 days if you tie all these partial appearances together. Would that be somewhere near a fair statement of the total time in court?

Mr. Fisher: Do you mean in actual——

The Witness: Time in court?

Mr. Fisher: During the trial or all together?

The Witness: During the pendency of the litigation.

Mr. Fisher: I frankly haven't examined it. I would think it would be at least that many.

The Witness: Yes I have an opinion.

The Court: I have a couple of matters.

I don't want to take offense at this statement and waste time but the statement said that it took plaintiff 19 days of the 33 to put on plaintiff's case. Actually the majority of that was cross-examination of plaintiff's witnesses including one entire day spent upon the cross-examination of a witness as to one exhibit.

Is that right?

Mr. Fisher: That is correct. And we would ask the question to include that.

Mr. Fowle: I don't think that we would agree that most of the 19 days was taken up with cross-examination.

The Court: I said the majority.

Mr. Fowle: Or even the majority. [4902]

The Court: I haven't made an accurate estimate.

(Testimony of Charles E. Beardsley.)

but my guess would be that over half of those 19 days were cross-examination.

Mr. Fowle: We were aware of it that a good deal of it was cross-examination, and therefore we included in the hypothetical question a request that this witness assume that a substantial amount of cross-examination was engaged in.

The Court: I can't give you an accurate figure. I think we will both agree that there was extensive cross-examination, and that 19 days for plaintiff to put on its case might be misleading, standing alone.

Mr. Fisher: I will agree to that, your Honor, and ask that the question be amended to include that.

The Court: The other thing, which has nothing to do with the question, but which bothered me, was that you referred to a request for a continuance made by defendants, which you said that I refused, but that Mr. Dixon had to make a trip, so I granted a continuance. The implication there bothers me.

Actually what happened was that a request for a continuance was made to a longer date than I continued it, and at the time the request was made for the continuance by the defendant, Mr. Dixon also called attention to his situation. I granted a continuance on defendants' motion, but not to the date you asked for.

Mr. Fisher: You are correct, your Honor, and I would ask [4903] that the question be amended in that respect.

The Court: It doesn't have, really, much to do with the question, but I didn't like to let it go by.

(Testimony of Charles E. Beardsley.)

Mr. Fisher: I do recall the incident where we asked for a continuance for the reason that we had not gotten the production of records requested, we asked for a longer date than your Honor felt he could give. I remember that at the time Mr. Dixon had been called to Washington before a Senate Committee.

The Court: And he was not opposing a short continuance because of his situation.

Mr. Fisher: That is correct.

The Court: Now, do you have an opinion?

The Witness: Yes, I have, on the question as amended.

Q. (By Mr. Fisher): What is your opinion as to a reasonable amount to be allowed the plaintiffs' attorneys?

A. In my opinion, the reasonable value of those services is $125,000.

Q. Will you explain to the court the basis of your opinion? A. Yes, I will be glad to.

The factors which I believe should be taken into consideration, and which I did take into consideration, in arriving at that sum, are these——

These are really headings, rather than full discussions. [4904]

(1) The time which the attorneys devoted, which is reported in their affidavits, the number of hours;

(2) The number of court days, roughly, the length of trial, and the number of court days otherwise;

(3) The amount involved in the lawsuit, which

(Testimony of Charles E. Beardsley.)

was a suit for $800,000, and in which a verdict of $500,000 was recovered;

(4) The intricacies of the legal problems, the difficulty of the problems which the lawyers who are seeking compensation had to solve, and they were difficult problems, in my opinion, from my rather hasty reading of going through the memorandum and points and authorities;

(5) The skill, the degree or quality of service rendered by the attorneys. And from my observations, and some of this is the rankest hearsay, because I was not in the court room during any of the trial, I believe the trial was very skillfully handled by principal counsel for the plaintiffs, and from what I have seen in a cursory examination of the papers, they are well done, and legal memoranda are well prepared.

These are not necessarily in order of importance, your Honor.

Another thing to be considered is the result obtained, which of course I believe was quite an exceptionally good result.

Another matter to be considered is the status of the [4905] lawyer. By that I don't mean whether he is the most brilliant lawyer that ever came out of law school, or just one that has worked his way up into the community, but I think fees in some measure have to be governed by a man's status in the community. If he is recognized—to take somebody who is deceased and who there can't be any issue about, Hubert Morrow of this Bar, or Walter Tuller,

(Testimony of Charles E. Beardsley.)

or some lawyer of 30 or 40 years in the community, who is both an able lawyer and a well-recognized lawyer, he can command higher fees than an equally able lawyer just out of law school or out of government service, and who hasn't won as many cases as big as this so as to establish his reputation.

I believe in the market of employing lawyers, that factor which I call status in the community has to be taken into account, because you can't hire Irving Walker for the same price you can hire a young man in my office, who I think will be just as good a lawyer as Irving Walker many years hence.

I think those are all of the headings or factors that I would take into account.

Now, after applying those tests, and each of those is a rather intangible test—after applying each of those tests, then I considered that the amount, $125,000, was a reasonable fee. Then I tested that in two or three ways. And this is something like saying if you are valuing real estate you take 100 times the monthly rental, or you figure the assessed [4906] value as being 40 per cent of the market value. If you take a lot of those you get some help. No one of them is conclusive.

In a case of this size, lasting this long, requiring this much of concentrated attention, in my opinion, if you figure it on an hourly basis, you wouldn't take the highest hourly fee which that lawyer might command. If he had a short piece of business that was going to take 15 hours or 10 hours, he might charge a much higher rate per hour than a case which was

(Testimony of Charles E. Beardsley.)

going on 14 months or three years, or something like that. I think the hourly basis has to be modified somewhat. On the other hand, the hourly basis is enlarged, because the case is a big case and the result was an excellent result. Just to test it I took an hourly basis of $25 an hour, and as I got it from the affidavits there was something like 5,100 hours spent by all of the lawyers, and at $25 an hour that came out, according to my mathematics, to $127,500.

Another possible way of testing it is on the contingent fee basis, and that doesn't fix reasonable value. Reasonable value of services, I think, is not the same thing as the price for which a lawyer would take a case on a contingent fee basis. If a lawyer is either appointed by a court, or is attorney for some trustee or court officer, where he doesn't have a contingent fee contract, I think the reasonable value of his service should be arrived at by a different method than the strict contingent fee method. [4907]

In my opinion it is wrong for lawyers, in cases where there are very large recoveries, to go very high on contingent fees. I think 40 or 50 per cent on a contingent fee in a case through the trial court is exorbitant, results in bad public relations, and is not the reasonable value of his services.

I think when you get into the hundreds of thousands of dollars the percentage should be either scaled so that it is high on the first one hundred or so and then scaled down, or should average out to an amount not more than 25 per cent.

(Testimony of Charles E. Beardsley.)

I tested this by 25 per cent of $500,000, which i $125,000.

If you test it by a third—and as I say, I don't think that that is fair in a recovery of this size—I think in a personal injury case, where the liability may be doubtful, a fee of a third is a very reasonable fee—if that is applied, you get $166,000. In my opinion, that is not a fair percentage in a matter of this size.

If you take it on another basis, and this is really not a good test at all, although some lawyers take cases on so much a day in court, which includes preparation—I don't think anyone in possession of all his faculties would take this kind of a case on that basis—but to test it, if there are 50 days in court, a fee of $125,000 for 50 court days, if you add all your one hours on motions and half a day [4908] on arguments, and you get 50 days, and including your 33 days of trial, that would be $2,500 a day, for which fee one could afford to spend a great deal of time in preparation for those days in court.

Those mathematical computations are not my method of arriving at the fee, but they are some hard and fast measuring sticks against which I try to test the fee of $125,000, which I arrive at by applying the general principles which I spoke of first.

I may have omitted one of those principles when I

(Testimony of Charles E. Beardsley.)

got mixed up in counting them with my thumb. If so, I trust Mr. Dixon will supply it to me.

Mr. Fisher: Thank you.

You may cross-examine.

Mr. Dixon: No questions, Mr. Beardsley.

The Court: Mr. Cohn, do you have any questions?

Mr. Cohn: No, sir.

The Court: I was going to ask one question. I don't want you to go without being cross-examined.

The Witness: I would rather have them cross-examine me, your Honor.

The Court: We start out with a premise that, of course, this is not to be fixed on a contingent basis, but what would you consider would have been a reasonable fee in this case on a contingent basis? [4909]

The Witness: That would be a matter of bargaining at the outset, and I am not thoroughly enough aware of the nature of the case to know what bargain would be made.

I anticipate that if somebody came to me with a case, and I am not in this field—let's say I got one of the cases where the Santa Fe jumped the track, or a group of them, which I thought might result in a $800,000 recovery, I believe if I knew, if I had a pretty clear liability case, that I would not go as high as a third; I think I might say, I will take a third on the first two hundred thousand, and 30 per cent on the next fifty, and 20 per cent—I would work out some kind of sliding scale, I think over all a 25 per cent contingent fee would be fair.

(Testimony of Charles E. Beardsley.)

no question raised, as I recall it, in the opinion of the Court of Appeals concerning the unfairness or the exorbitance of that fee. From what I know about the case, I don't think there was any more time put in on it by counsel for the plaintiff in that case than in this case. I may be in error, but from what I know about it. [4918]

Mr. Fowle: May I just say that I do have some familiarity with that case. The plaintiffs in that case, the plaintiffs' lawyers claimed, I think, 8,800 hours. I might also say that anyone who reads the opinion of the Court of Appeals and understands the tone and flavor of it can see what would have happened to that award of $275,000 attorneys' fees had the Court of Appeals deemed it necessary to go that far.

They reversed the judgment of the court below for letting error creep into the record in a great many different ways. They never reached the problem of whether or not the attorneys' fee was a reasonable one, and simply reversed the judgment, and when the judgment fell, so did the judgment for attorneys' fees.

Mr. Dixon: It stands, counsel, as the determination of the trial court, in any event, in that case of what it felt was a reasonable attorneys' fee, considering at least the amount of judgment.

The Court: I can read it as well as either one of you can.

The Witness: Has he asked me a question?

The Court: He asked no question.

(Testimony of Charles E. Beardsley.)

You admit you know very little about antitrust law?

The Witness: Nothing about it, except the way a general practitioner does. I don't know the intricate questions at all. [4919]

The Court: You would concede that the field of antitrust law is probably more intricate than the field of personal injury law?

The Witness: I would, certainly.

The Court: You also will concede that even with the study you made of the files and this hypothetical question, the chances are that you may not know as much about this case now as I do?

The Witness: I would be the first to say that, of course that is true. I couldn't in the few hours in examining files know a fraction of what you or any of counsel know about the case.

The Court: If I should disagree with you on what you think is a reasonable fee and an exorbitant fee—I am not saying that I am going to—but I trust that you will base it not on my utter rejection of your testimony but on the question of how familiar you were with the case and the work done.

The Witness: I said before, your Honor, that I knew that my being brought in here, a friend of yours, would not affect you in any way; and you know that your decision in this case will not affect my regard for you in any way.

I think that is a fair statement.

The Court: That is fair enough.

All right. Thank you, Mr. Beardsley. [4920]

(Testimony of Herman F. Selvin.)

Direct Examination

By Mr. Fisher:

Q. What is your occupation?

A. I am a lawyer.

Q. How long have you practiced your profession?

A. Since 1927, with the exception of nearly four years during the World War when I was elsewhere and otherwise engaged.

Q. At that time, as I recall it, you were in the Navy, were you not, as a Lieutenant Commander?

A. Yes.

Q. What was your legal education, Mr. Selvin?

A. I graduated from the University of California law school at Berkeley in 1927 with the degree of—which was then being conferred—of Juris Doctor. [4927]

Q. At the University of California were you not on the Law Review? A. I was.

Q. As a matter of fact, were you not born in Russia? A. I didn't hear you.

Q. Were you not born in Russia?

A. Yes, sir, in Lithuania, which was then, as I understand it, reluctantly a part of the czarist realm.

Q. And you came to this country at an early age?

A. In 1909 at the age of 5.

Q. And entered the University of California in what year? A. 1920.

(Testimony of Herman F. Selvin.)

Q. On completion of your work at the University of California were you then admitted to the California Bar? A. Yes.

Q. To what courts have you been admitted?

A. All of the courts of the State of California, Court of Appeals for the Ninth Circuit, United States District Court, Tax Court, and I think the Customs Court. Maybe others.

Q. Are you a member of a firm in Los Angeles?

A. Yes, I am a member of the firm of Loeb & Loeb.

Q. How long have you been a member of that firm?

A. Well, of that firm and its predecessor firm Loeb, Walker & Loeb, since 1934. Prior to that time, from the time [4928] of my graduation from law school until I became a member of the firm, I was associated with the firm in the customary or conventional salaried way.

Q. So that all of your practicing years you have either been associated with that firm or a member firm; is that correct? A. That is right.

Q. What has been the general nature of your practice, Mr. Selvin?

A. It has been almost entirely confined, after the first couple of years, to the trial and appeal of litigated causes.

Q. You have then specialized in trial work and appellate work during your practicing years, have you? A. Yes.

Q. Are you a fellow of the American College of Trial Lawyers, Mr. Selvin? A. I am.

(Testimony of Charles E. Beardsley.)

I can't appraise this. This is a matter of bargaining at the outset. I can't put myself back where they were.

The Court: We are not going to decide this on the contingency basis, but I notice you took your 25 per cent contingency on $500,000, not on $1,500,000, which is the recovery.

The Witness: Is this a question, or just an opening for me?

The Court: This is a question.

The Witness: I am not versed in the philosophy of antitrust cases. In my ignorance, I believe that $500,000 represents what the jury said was the damage actually sustained by [4910] reason of the acts complained of, and $1,000,000, the trebling, as I understand, is a penalty, because these people violated the law, the jury found they violated the law. It seems to me that the contingency should be based on the damage. If you are taking a contingency fee, it should be based on the amount of the damage.

There must be some law on that. I never looked it up.

I want to say something further, because Mr. Warne, who is a fine lawyer and a fine man, shocked me by his testimony as to the amount. It is just like the psychiatrists; one says he is sane and the other says he is not. In any event, Mr. Warne said something which I didn't fully catch as to the penalty aspect of the attorneys' fees. My answers have not been based on how much should be assessed as at-

(Testimony of Charles E. Beardsley.)

torneys' fees so as to penalize these people. My answers are based on the reasonable value.

If the law provides in a case where there is a $500,000 verdict, that automatically it is trebled, I don't think that adds to the value of the services rendered in getting the $500,000. I think the services are worth that to get $500,000, which automatically carries the treble.

The Court: I heard Mr. Warne's testimony, too, and I noticed that. But I think Mr. Warne's point was not that attorneys' fees should be so fixed by the court so as to penalize a defendant, but that the allowance of any attorneys' fees [4911] at all have been provided in the statute as a penalty. In other words, the only reason that the prevailing plaintiff in one of these actions gets any attorneys' fees is that the Congress has said, "That is one of your burdens that you will have to bear if you are found liable of violating the antitrust laws, you will have to pay a reasonable attorneys' fee."

There is a big difference between fixing an attorneys' fee for the purpose of penalizing the defendant, and on the other hand the fact that the Congress has allowed an attorneys' fee, which in a way is part of the penalty or burden which he must bear.

The Witness: If I say anything here, I think counsel should have a right to cross-examine me, because I am going beyond what I said in my direct testimony.

(Testimony of Charles E. Beardsley.)

The Court: Anyhow, I want to get back to this contingency matter.

It is true that $1,000,000 added to the half million is the penalty which the law provides. But the injured party recovers that money. That penalty does not go to the public, doesn't go to some charity. It goes to the injured plaintiff. Now, if you are figuring the case on a straight contingency basis, wouldn't you, regardless of what your percentage would be, wouldn't you take a percentage of what amount the plaintiff actually recovered in dollars?

The Witness: You mean I am the lawyer bargaining with [4912] the client?

The Court: Yes.

The Witness: I don't know, because I never had one of these.

In cases that I handle, personal injury, will contests, and so forth there are no penalty features at all. I think it would be, if I may express myself, morally wrong if the attorneys' fee, which the Congress said should be a reasonable fee, is trebled beyond what is a reasonable fee for these services, because of the penalty provisions which treble the damages. That seems to me to be morally wrong. If the Congress said attorneys' fees should be trebled, that is something else.

The Court: We are talking about different things. I agree with you that to treble attorneys' fees would be morally wrong, but I am posing this question: If you are bargaining with a client who had a potential recovery, where there was the pen-

(Testimony of Charles E. Beardsley.)

alty involved, on a contingent basis—and the court is not going to fix this fee on a contingent basis—but if you were bargaining with a client, wouldn't you bargain with him, regardless of what your percentage might be, on the basis of what the recovery was to him in hand at the conclusion of the case?

The Witness: I have never been in that position, and I think I should not—maybe the flesh is weak, maybe I would, because I want to get a fee based on a large amount. But I [4913] think we are dealing with something—maybe this shouldn't be taken into consideration by the court—but I think this subject of fees is one which reacts very badly on our profession. Ordinarily we get the worst reaction when a poor person is charged an exorbitant fee. But I know we get the reaction when a rich corporation—I don't mean this is a rich corporation, but let's take the Standard Oil Company is charged a million dollar fee, and the people read it and say, "Look, those lawyers are setting the price of gasoline up." I think it is bad for lawyers to charge exorbitant fees.

This is an opinion, but I think I may be qualified as an expert here, I think Mr. Warne's suggestion, and the plaintiff's attorneys' suggestion, in view of the size of this case, and all the factors that I have mentioned, is an exorbitant fee, which I think not only would react against the Bar generally badly, but I think might very well react badly against the lawyers who sought it and perhaps got it. I think they have made a name for themselves in

(Testimony of Charles E. Beardsley.)

the job they have done in this case, not just the result, but the quality of work that I have seen, and from the rumors, which are hearsay, about the way the case was tried, and I think that over a lifetime in law practice in the community lawyers come out better if they are more moderate in their charges than if they try to get it all in one case.

Mr. Dixon, I am not criticizing you personally, we have [4914] never met, but this is something that is rather close to my heart because of going around trying to sell the legal profession to the public for two or three years while on the Board of Governors.

The Court: I might say, Mr. Beardsley, when I was practicing law, I generally used a sliding scale on contingent fees based upon whether the case could be disposed of by settlement, preparation for trial, trial, or appeal. And I feel that sort of a thing is always fairer than this straight 40 per cent, or some of them took 50 per cent across the board.

The Witness: The lawyers who take 50 per cent I think are doing great harm to the profession.

Mr. Cohn: Your Honor, in view of the last colloquy, I have one question to ask, if I may.

The Court: Yes.

(Testimony of Charles E. Beardsley.)

Cross-Examination

By Mr. Cohn:

Q. Mr. Beardsley, would you consider a fee of $227,000 exorbitant and the kind of thing which would bring the Bar into bad repute, that being the exact amount paid to the attorneys for the defendants in this case?

A. I don't think I could answer that, Mr. Cohn, without having some of the information of the kind that was given to [4915] me in the question that I was asked, where there was 35 minutes of information given me. You are asking me a quick question.

I know the standing of Ross Fisher and Farrand, Fisher & Farrand in this community, and I know the standing of Pope & Ballard in Chicago. I know the quality of work that Ross Fisher does in this and many other cases, I know the kind of fees that that firm commands. I know the kind of fees that Pope & Ballard command, I have seen the quality of work of both of those offices, and the other lawyers out here in Corona, wherever it is, just as I have observed the work of the gentlemen at your table in this case. I have no idea how much time they put in. Maybe they put in 10,000 hours, and maybe they put in 1,000 hours.

Without knowing those other things, I couldn't answer.

They lost the case, which makes a lot of difference in the testimony about reasonable values. But I don't think there is enough information in what

(Testimony of Charles E. Beardsley.)

was elicited from them across the table while I was here this morning, on how much has been paid to them, for me to say whether it was a reasonable fee or not a reasonable fee.

Conceivably it could be an exorbitant fee, if they lost the case and they put in few hours. They still have stature and very good quality of work on both sides, but I don't know how much time they put in.

Q. The answer is you don't know? [4916]

A. I can't answer without—I would be glad to have you get that information for me. Because I don't think the Judge could pay any attention to that amount that was brought out, unless he knows what they did.

One thing more I would say, if I may, about that. I don't want to be arguing this, because if I begin arguing the case I destroy what little effect my testimony had.

The Court: You might have to get another fee.

The Witness: I am glad you brought that out.

I have never taken a fee for testifying about attorneys' fees. The reason is, I believe when an attorney—usually I have been on the side of the attorney asking for fees—I believe if he is asking for a reasonable fee he should have anybody who has any kind of standing come and tell the court, and the jury, and the public, that it is reasonable. And if it is unreasonable, I think it is the duty of other lawyers to come in and say it is unreasonable, for the protection of our profession.

I have never taken any fee for testifying for a

(Testimony of Charles E. Beardsley.)

lawyer on attorneys' fees, and in this case I am not testifying for a lawyer, but against lawyers, my brothers, and for a corporation, but I shall not bill this corporation for my fees—for my time, I mean. I don't care whether they pay anything or not. I am more concerned with there being a reasonable fee.

My study has been brief and concentrated of the case, and [4917] I am not as thoroughly familiar as I would be in a longer time. On that study I believe my testimony is sound.

Mr. Dixon: I would like to ask one question, Mr. Beardsley.

Q. (By Mr. Dixon): Are you familiar with the Emich case in which General Motors was the defendant?

A. No, sir, I never heard of the case until you cited it this morning.

Q. Counsel for the defendants in this case defended General Motors in that case, so obviously it was well defended. The judgment entered in that case was less than the judgment in this case, will be, exclusive of attorneys' fees. It was for $1,493,358.10. That included costs,

A. Is that before or after trebling?

Q. That is the trebled judgment. The court in that case awarded $250,000 to the plaintiff for attorneys' fees, and while the case was subsequently reversed by the Court of Appeals, and the Court of Appeals was then reversed by the Supreme Court and the cause remanded for a new trial, there was

* * *

The Court: You may proceed.

Do you have another expert witness that you want to call, Mr. Fisher?

Mr. Fisher: Yes, your Honor. This hearing was continued to this date for that purpose.

Before doing so, however, at the last hearing, your Honor will recall that over our objection you required the disclosure of the amounts that the defendants had paid, not only the defendants Sunkist and Exchange Orange, but also the defendant Exchange Lemon Products Company, had paid in attorneys' fees in the action. Without waiving our objection to your Honor's requiring us to disclose the amount paid, we would like to have shown, as long as the amount has to be shown, the number of hours which the attorneys spent on the matter, and that is a total of 8,768 hours. That is actual hours, except as to some of the recent time, in which it has been estimated.

The Court: Are you satisfied to take Mr. Fisher's figures for that, Mr. Dixon?

Mr. Dixon: Yes, your Honor. If he so states, that is sufficient for me. [4925]

The Court: Total hours for all lawyers, is that it?

Mr. Fisher: Yes.

Mr. Dixon: Does that include the time of trial counsel?

Mr. Fisher: That includes the time of trial.

Call Mr. Selvin to the stand.

HERMAN F. SELVIN

called as a witness on behalf of the defendants, after having been first duly sworn, testified as follows:

The Court: Are you going to ask Mr. Selvin the same hypothetical question that you asked the other expert?

Mr. Fisher: I propose to do it, and I may say that I can shorten it.

The Court: Shall we do it by reference? I see Mr. Selvin has the transcript in his hand.

Mr. Fisher: That is right, I submitted to him the hypothetical question, and I also gave him the portion of the reporter's transcript which contains the amendments which were made to the question, at the suggestion of your Honor and counsel for the plaintiff, and I would ask that the hypothetical question which was read to Mr. Beardsley, as amended by the matters which appeared thereafter in the transcript, be taken as the hypothetical question which would be asked Mr. Selvin.

The Court: Is that satisfactory? [4926]

Mr. Dixon: Yes. If Mr. Selvin says he has read the question, that is satisfactory to the plaintiff.

The Witness: I have.

The Court: You read the question and the discussion that followed thereafter?

The Witness: Yes, I have, your Honor.

The Court: That will be satisfactory, then.

The Clerk: What is your name?

The Witness: Herman F. Selvin, S-e-l-v-i-n.

(Testimony of Herman F. Selvin.)

Q. Have you been active in state and local bar activities? A. Yes.

Q. Will you recite some of your activities in that connection?

A. Well, I am presently a member of the Board of Governors of the State Bar; I am a past president of the Los [4929] Angeles County Bar Association; I have been on the usual run of Committees and other activities, but I think those two are the only ones that need be mentioned.

Q. As a matter of fact, are you, in effect, the head of the trial work for Loeb & Loeb?

A. I am the senior man in that department. And while I don't handle the administrative details of the department I am the head of the department.

Q. You do supervise their trial work, do you?

A. To a considerable extent, yes.

Q. Has your firm had a number of antitrust cases? A. Yes, over the years quite a number.

Q. Including private treble damage antitrust cases?

A. That is right. In fact, I should say largely that, although there have been Government actions, too.

Q. Do you feel that you are familiar with the charges made by attorneys generally in this locality in more important litigated matters?

A. I believe so.

Q. Over the week end you have studied the hypothetical question which I propounded to Mr. Beardsley at the hearing last Friday, and did you

(Testimony of Herman F. Selvin.)

also study the transcript as to the suggestions to changes in that question?

A. I have studied both of those documents, yes.

Q. Based upon those assumed facts, which are contained [4930] in the hypothetical question as amended, Mr. Selvin, do you have an opinion of what would be a reasonable amount to be allowed the plaintiff and intervener as attorneys' fees in this action? A. I do.

Q. What is that amount?

A. In my opinion, in the range of $75,000 to $100,000.

Q. Would you explain how you would determine that amount to be a reasonable fee?

A. Having gotten an idea of the nature of the litigation and the type of work involved, I attempted first to evaluate it over all, taking into consideration the time which the hypothetical question indicated was spent, the nature of the responsibility assumed, the nature and complexity of what I gather to be the issues in the case, and the result accomplished.

Having done that, and having arrived at the opinion that a fee in the neighborhood of $100,000 would be a reasonable fee, I attempted to confirm or disaffirm that conclusion in several ways.

I first tried to compute a fee on a strictly time basis, assuming for that purpose that $500 a court day for the trial would be a reasonable fee, and that for the preparatory work $20 an hour would be

(Testimony of Herman F. Selvin.)

reasonable. That brought me a figure of in the neighborhood of $120,000. That, in my [4931] opinion, confirmed my original estimate, because I had to make or felt that I had to make certain allowances on the time basis.

In the first place, inevitably, because there was somewhere in the course of the proceedings, as I understand the hypothetical question, a change of attorneys, or at least an addition of a chief trial counsel, there had to be, necessarily, in my opinion, some duplication of work, a recovering of past ground. Then judging from my own experience and noting in the hopothetical question that with the exception of the time attributed to the attorney called Mr. Reich in the hypothetical question, the time figures were estimates, and judging from my own experience, it seems to me that attorneys who are extensively engaged in a long drawn out matter, and who even though they keep time records have pretty much of a tendency, certainly it is true of me, to over-estimate the time they actually spend. I also made some allowance for the fact that, as the hypothetical question indicates, some part, some unspecified part of the time spent by the attorneys was consumed in investigative work, which had there been other funds available would normally have been done by an investigator, or perhaps a law clerk, and for which of course the charge would be substantially less than that for an attorney's time. So it would seem to me that on a

(Testimony of Herman F. Selvin.)

time basis the figure of $100,000 was [4932] reasonable.

I then reviewed, although not exhaustively or intensively, the action of various courts of appeal in passing upon the reasonableness or unreasonableness of allowances in comparable circumstances, and the results that I saw there seemed to confirm my opinion.

And then in my own mind I compared the fee—and perhaps at this point I should interject that in arriving at my opinion I have made two fundamental assumptions: first, that the amount recovered for fee purposes must be deemed to be $500,000, rather than the trebeled amount by way of penalty; and, secondly, that the fee is to be fixed with respect to its reasonableness, and not on a contingent basis. Nevertheless, I attempted to arrive at an opinion as to what a fair contingent fee in a situation of this sort would be, in order to check my own opinion as to the reasonable value. I think in that regard, in order that the bases of my opinion should be fully before the court, so that it may be fully evaluated, I think that it is necessary that I explain my attitude toward contingent fees.

I think they are necessary, and from a social standpoint a desirable feature of the practice of law, because they permit persons with just claims to present them in circumstances where, but for the contingent fee basis, they might be unable to present them, or unable to obtain an attorney to

(Testimony of Herman F. Selvin.)

present them. However, I think, and have felt for [4933] some time, that one of the scandals, you might say, of the legal profession, has been for some time the exorbitant percentage which is sometimes charged by way of contingent fee.

I take the position that a lawyer practices, of course, to earn a living, but that he is also a member of a profession, a profession which is inseparably associated with the administration of justice; that anything that brings discredit on the profession necessarily brings discredit on the administration of justice. And I think that that is a factor that has to be taken into account in fee fixing, whether we are fixing a contingent fee or a reasonable fee. Because if lawyers acquire a reputation for charging exorbitantly for their services, it must inevitably reflect, in my opinion, on the administration of justice.

It is my feeling, and has been for a long time, that except in very exceptional circumstances a contingent fee in excess of one-third of the amount recovered is unreasonable and exorbitant, and unprofessional in my opinion.

On that basis, and on the assumptions which I have indicated, a fee in this case would be $166,000, and since on a reasonable fee basis the fee must necessarily be less than a fee on a contingent fee basis, because the speculative element which justifies the larger amount is eliminated, it again seemed to me that the range which I have indicated [4934] was reasonable.

Mr. Fisher: You may examine.

(Testimony of Herman F. Selvin.)

Mr. Cohn: If the court please, Mr. Dixon and I have agreed, if it is agreeable to your Honor, that I may take the cross-examination.

The Court: All right.

Mr. Fisher: May the court please, I believe Mr. Cohn is not of record in this case.

Mr. Cohn: That is right, I am not. I came into the case, I don't recall, on last Friday, and asked leave to appear on behalf of Mr. Reich, that circumstance arising out of a form of judgment which I called the court's attention to and which had been served on us.

The Court: I was under the impression that I permitted you to appear for Mr. Reich, but maybe I didn't.

Is there any objection to him being allowed to appear for Mr. Reich on the fee problem only?

Mr. Cohn: If there is any question, Mr. Reich can conduct the examination.

Mr. Fisher: We will waive any objection to his appearing on behalf of Mr. Reich.

The Court: The record may show that Mr. Cohn appears for Mr. Reich on the fee problem only, and by stipulation between Mr. Reich and Mr. Dixon this cross-examination is for the benefit of whoever may benefit by it. Is that [4935] right?

Mr. Cohn. Yes.

The Witness: Does that include me, your Honor?

(Testimony of Herman F. Selvin.)

The Court: I don't know.

Mr. Cohn: It may include you, Mr. Selvin.

Cross-Examination

By Mr. Cohn:

Q. Mr. Selvin, your firm has represented, in the past, a number of motion picture producing companies, has it not? A. Yes.

Q. And other clients who are in the entertainment industry, other branches of the motion picture industry besides the production?

A. If you include the distribution or exhibition, I would say yes. I don't believe we have gone into what you, Mr. Cohn, call the creative branches of industry.

Q. Have any of those firms, who have been your clients in the past, have they ever been defendants in civil treble damage antitrust actions?

A. Frequently.

Q. Would you estimate the number of such actions which have been brought against these clients, say during the past 10 years?

A. Well, it would be a guess, Mr. Cohn, but I think in this district alone there have at one time or another been [4936] as many as, I believe, 20 or 25 of such actions pending against various companies, some of whom are our clients.

Q. And are there any such actions pending against your clients at the present time?

A. There are.

Q. Does your firm have a reasonable expectancy,

(Testimony of Herman F. Selvin.)

in your opinion, to continue to represent some of these companies who are defendants in these antitrust actions?

A. We all hope so. And I think we have a reasonable expectancy.

Q. As a matter of fact, your firm has represented these unnamed clients in the motion picture industry for a number of years, more than 20 years, isn't that true?

A. Oh, yes. As a matter of fact, they were representing, generally, I don't believe the antitrust situation had arisen, but they were representing a number of them when I came to work for the firm.

Q. It is true, is it not, that these clients whom I have been referring to have an interest in keeping awards for attorneys' fees to plaintiffs as low as possible?

A. The clients have, but the clients also have no mortgage on my conscience, Mr. Cohn.

Q. Has your firm ever represented a plaintiff in an antitrust action?

A. Treble damage? [4937]

Q. Yes.

A. I don't recall any situation where an action has actually been commenced. However, we have represented clients who have had claims based upon alleged violations of the antitrust laws, which have been disposed of without action one way or another.

Q. I understand your answer to mean, then, that

(Testimony of Herman F. Selvin.)

your firm has never, to your present recollection, commenced such litigation?

A. That is true, I don't recall of any that we have commenced.

Q. Mr. Selvin, if I understood some of your answers correctly, there was at least one instance in which you stated that you departed from the hypothetical question and made some assumptions which were not contained in the question; is that correct?

A. Yes. Those two assumptions being that, No. 1, the fee had to be fixed with relation to the amount of actual damages awarded, as distinguished from the trebled amount; and, No. 2, that the fee had to be fixed on the basis of its reasonableness, and not on a contingent basis. Those are two assumptions of law, rather than fact, I should say.

Q. Did you not also say that you assumed that there had been an over-estimation of time spent by some of plaintiff's counsel? [4938]

A. I think that is probably the effect of it, judging from my own experience, that the time estimate would probably to some extent be liberal.

Q. So that your answer as given was not, in fact, based on the hypothetical question, but included—— A. Mr. Cohn——

Q. Please let me finish the question.

A. I am sorry. I thought you finished the question.

Q. (Continuing): ——but included an additional assumption, which is to say the one you

(Testimony of Herman F. Selvin.)

expressed, that the hours stated were over-estimated?

A. No. In that part of my testimony I was relating the processes by which I was checking the opinion which I had arrived at on other bases, and that was in the course of my explanation why on a strictly time basis a fee of something over $100,000 did not change my opinion that the over-all value of the work here was $100,000.

Q. It may be a matter of some importance, Mr. Selvin, so I must ask you the question again. Did you assume that the time which was indicated in the hypothetical question was over-estimated by plaintiff's counsel?

A. For the purpose of my opinion as to the fee, no. For the purpose of checking the accuracy of that opinion, I made the assumption that I have previously indicated.

Q. Did you examine any of the files in this case? [4939] A. I did not.

Q. Did you examine the affidavits of any of the plaintiff's counsel in support of their application? A. I did.

Q. Mr. Selvin, you stated that you felt that one-third of the amount of recovery was in your opinion the maximum which should be allowed in a contingent fee arrangement?

A. I am expressing my general opinion with respect to contingent fees generally, whether in this type of case or any other, that in my opinion one-third was the maximum which, absent unusual or

(Testimony of Herman F. Selvin.)

exceptional circumstances, could in my opinion be justified from the standpoint of the standing and prestige of the Bar as a whole.

Q. Will you explain why it is, Mr. Selvin, that in checking your opinion which you gave in this case, and in adopting the assumption of a contingent fee arrangement, you did not use the total amount of the recovery, which is $1,500,000?

A. Again, because on the assumption of law which I have indicated I made, which I believe to be an accurate assumption, but that is not for me to determine, on the assumption of law which I made I am asked to testify with respect to an action which resulted in a verdict or judgment of $500,000. That is why I considered it that way.

Q. You also know that so far as the amount allowable [4940] in the test, that no contingency feature is taken into consideration, so I am directing my attention to that portion of your answer in which you tested the opinion which you gave, and you made an assumption for the purpose of testing your opinion that this was a contingent fee arrangement, and upon that assumption will you explain why you did not use the total amount of recovery, rather than the $500,000?

A. Mr. Cohn, I can't do anything else except repeat my previous answer, because as I understand the matter on which I have been asked to express an opinion it is in respect of a judgment which must be said to be $500,000. And since I have expressed an opinion as to the reasonable

(Testimony of Herman F. Selvin.)

value of services which resulted in obtaining a judgment in that amount, for the purpose of testing that opinion I assumed a contingent fee arrangement in respect to the same amount.

The Court: You have been using the term "judgment" and "verdict"; they are two different things. The verdict in this case was half a million dollars; the judgment will be for that amount trebled, less a settlement made by Tree-Sweet.

The Witness: That is correct. And I am assuming, it would be more accurate to say that I understand that the fee must be fixed in relation to the actual damages awarded, which under the hypothetical question was $500,000.

I will say, Mr. Cohn, again, as I understand the law, that what the courts have said about that is the amount that [4941] results from the trebling is not due, so the cases say, not due to the services from the attorney, but something that the law automatically superimposes on the amount that is attributable to his efforts. That is just another way of saying why I assume $500,000 instead of a million and a half.

Q. (By Mr. Cohn): You would then, I take it, assume a different maximum of percentage in those cases in which the law trebles the judgment; is that the essence of your statement?

A. The maximum percentage?

Q. Yes.

A. No. If I understand your question correctly,

(Testimony of Herman F. Selvin.)

it is not a question of percentage, it is a question of amount in respect of which the percentage is applied.

A contingent fee must necessarily be one by agreement. If a party is well advised and not taken advantage of, in an action of this sort, wants to agree on a contingent fee based on the trebled amount, rather than the actual damage, I suppose it is in the prerogative of the party to do it, and the attorney to work under that kind of arrangement. Whatever opinion I might have is its effect on the profession.

Q. Mr. Selvin, in giving your opinion as to the reasonable value of the plaintiff's attorneys' services, did you take into consideration the fact that in this case no retainer was paid to the plaintiff's counsel? [4942]

A. Yes. I saw no statement in the hypothetical question that a retainer had been paid. However, again, I have to point out that on the assumption that I have indicated, that the fee must be fixed on a reasonable fee basis, not on a contingent basis, that to my mind presupposes that there would be some compensation to the attorney regardless of outcome, even though no retainer had been paid. [4943]

* * *

The Court: The defendants' brief, as I commented before, had a fairly good summary, most of which I agreed with. One of the factors to be considered was the time and labor which has been

fairly and properly expended in the case. And I am inclined to accept the figures of the estimates of the plaintiff lawyers in that respect.

(2) The novelty and difficulty of the questions presented and the quality of skill demanded in the case. And I have already commented that I thought the case is novel, it doesn't follow the pattern of the treble damage suits against the motion picture industry. Secondly, of course there was no decree, as there was in many of the motion picture cases, where the plaintiffs under the Supreme Court decision could get certain support out of the decree. Therefore, I considered the difficulty of this case as far greater and the quality of skill demanded in the trial as far greater. There was very little pattern material that could be used.

No. 3, the skill employed by counsel.

I have already complimented Mr. Dixon for his skill in the case, and Mr. Irwin's assistance and diligence.

(4) The amount involved as it reflects the risk of the client and the commensurate responsibility of the lawyer.

It is rather an intangible in this case, because the plaintiff was either out of business if there was no verdict—I mean if there was no recovery, and of course if there was [4944] no recovery, there would obviously have been no appeal available to the plaintiffs, as a practical matter.

(5) The result achieved. That speaks for itself.

(6) The eminence, ability and standing of counsel.

I think that we had good counsel on both sides of the case. I think Mr. Dixon is an outstanding authority in the field of antitrust law, and the results achieved by him in his service for the government clearly demonstrated that ability before he ever tried this case.

Mr. Irwin's reputation and ability, I am familiar with.

Mr. Reich, who has engaged in this type of case, and who has appeared before me, has an alert and facile mind. As a matter of fact, there are two considerations in connection with Mr. Reich; one negative and one positive. One, that he abandoned the horse in the middle of the stream for all practical purposes when he insisted that I fix a contingency fee for him or he would get out of the case, and I, following some exchange, had to ascertain whether he was making that statement as it sounded; when it appeared that he was, I turned down his request and he went out of the case.

On the positive side of the case, there is no doubt in my mind that the real contribution that was made by Mr. Reich was in analyzing this situation and in reaching a determination that there was a cause of action, and in originally having the insight to get the case started. I think that was an important [4945] contribution. How it fits in with the contributions made by other counsel is another question.

But that is a compliment as to your ability and

eminence, Mr. Reich, because it is one thing for a judge to go through pleadings and see the point that lawyers make, but it is another thing as a lawyer to formulate a theory from nebulous facts and eventually see that theory work out.

Now, as to factors not to be taken into account, I agree No. 1, the ability of the defendants to pay, is not a factor, where the defendant has some reasonable ability to pay. If the defendant is, of course, a poor or impoverished person, that may become a factor.

(2) The financial condition of the plaintiff, defendants concede, should not be considered.

(3) The uncertainty of the fee, I agree, should not be a factor.

Certainly this should not be looked upon as a matter of a contingent fee.

I may have made some general remarks in the past about plaintiff's counsel undertaking this case on what I may have said was a contingency. That may have been properly said as to things occurring at that time. But a contingent fee is a fee by agreement, and this was not agreed to be a contingent fee, and I don't think that factor should be considered. Certainly this shouldn't be considered as a contingent fee. [4946]

The real two questions in my mind that I am not certain of are 4 and 5. (4), whether the punitive damages resulting from trebling the verdict may be considered at all; and (5), the question of the fees paid to defendants' attorneys.

Now, taking up the last one first. There is appar-

ently no law squarely on that point. You have cited some cases with the word "see," and I don't think the defendants contend that those are authorities on that proposition. Certainly they are not cases in this Circuit. As I recall, they are both State cases.

Are they not?

Mr. Fowle: That is correct. They were decisions by the Supreme Court of Michigan, your Honor.

The Court: However, I think as a matter of logic there are some inferences, small they may be, that may be drawn from what the defendants thought about the case and what they did about defending it. I am not going to place any great weight on that fact. If anything, the defendants are in a better position on the present state of the record than they would have been without making that disclosure, because I would have guessed, probably, that your fees ran higher than the representations made by Mr. Fisher.

Of course, I know, also, that there were other moneys expended by the defendants in defending the case, which probably has nothing to do with the matter here, except the general [4947] feeling that the defendants spared no horses in defending this case. If it was necessary to photostat an entire booklet of accounts, it was photostated. There was available to defendants, to what extent they wanted it, a complete reproduction of the records of the plaintiff.

Plaintiffs, on the other hand, were at the disadvantage of having a company that had gone out of business, with records piled and stored away,

and instead of having the ordinary opportunity of being able to have records available on call from employees of the corporation, they had as much difficulty, I would assume, and from what I have heard here I would infer, in getting specific information out of the records as the defendants themselves did.

Mr. Fisher: May the court please, I don't want to interrupt your Honor, but I would like to point out that the defendants—I don't think it is comparable, because the defendants' position is that there were the three defendants concerning whom you required disclosure. Now, the Exchange Lemon Products Company historically have been separately represented. There was a conspiracy charge. They had separate representation, and Sunkist and Exchange Orange had other representation, which required additional time.

Then there was the further fact that due to the rulings of Judge Byrne, and of your Honor, we were required to answer interrogatories, which required a great deal of attorneys' [4948] time in accumulating information for the other side, whereas we had to ferret out the information through examination of their records.

And, yet, another point is, and this goes to the comparablity of the matters, another point is that they brought an action based on five causes of action, which we had to defend against, and as to the State cause of action, it was not dismissed until just before the trial, and as to the Robinson-Patman

Act, it was dismissed pretty close to the end of the trial.

The Court: You were never deceived about that. In our pretrial discussions I can recall stating, and everybody seeming to agree, that if there was nothing to this lawsuit except the Robinson-Patman Act charges and the State charges, the case probably wouldn't be here.

Mr. Fisher: I remember your Honor inviting the dismissal as to that, but Mr. Dixon wouldn't do it. We had to defend against that. And then there is the further fact——

The Court: Well, the potential recovery under the Robinson-Patman Act was definitely limited in amount. The potential recovery under the Robinson-Patman Act could have been only a minor verdict.

Mr. Fisher: I admit it would have been a smaller amount. And, then, the further fact was that all of the time that the attorneys for Exchange Lemon Products spent, before [4949] the dismissal —Exchange Lemon Products was dismissed out of the case.

The Court: That is an unusual situation, and I have that in mind. Apparently Pope & Ballard came in for Lemon Products, did a lot of work for Lemon Products, and then subsequently Pope & Ballard came in for the other two defendants, and obviously what they had done for Lemon, in investigation and so forth, was utilized by Sunkist and EOP. I don't think there will be any denial of that.

Mr. Fisher: To a degree, of course.

The Court: To a degree that is hard to fix, but to a degree.

Mr. Fisher: Yes. But insofar as the Exchange Lemon feature of it was concerned, the dismissal as to them, a great deal of the work could not be utilized.

The Court: But, also, I have in mind this—that Exchange Lemon, by its motions, was definitely trying to get itself out of the case on motion, and Mr. Williams' remarks on several occasions indicated that. Then you have an odd situation, where three defendants, all part of this cooperative organization, where the one defendant who apparently had the best defense apparently early in the stages at least spent the most money for defense, and then subsequently when Lemon went out of the case those same attorneys came over and represented Sunkist and EOP. I am not so sure that there are [4950] not certain inferences that I might be able to draw from that, if I wanted to draw them.

It could definitely be inferred that that was merely careful planning by defendants in connection with who was going to pay for all this preliminary work.

I say that is an inference that I might draw. I don't say that I am going to draw it.

I realize that this is an unusual situation as to Lemon and its relationship in this case.

At any rate, going back to what started this off. You will concede, will you not, Mr. Fisher, that the defendants didn't spare the horses as far as the defense of this action is concerned?

Mr. Fisher: We tried not to, yes, sir.

The Court: All right.

As I say, there is no law on this, but I am inclined to think that it is a proper matter to take into consideration, and although I am not attaching undue weight to it, I am going to consider that factor. And if there is error in fixing these fees, the Circuit can easily remedy that part of the case. It should not present problems to them that might possibly be presented by other matters in the case. It is a matter which could easily be presented and easily ruled upon.

No. 4 of this list, punitive damages, there is one loose end there which I don't think any research has been done upon, [4951] and I would hesitate to finally rule on this until someone advised me whether they looked into the matter, and that is this: I was thinking of this matter over the week end, and it is an amazing thing. Congress in passing federal statutes has known what to say when they wanted to say it about attorneys' fees. Congress has had no trouble in framing language about attorneys' fees. Now, in the case before us we have the section which says, so we will have it in mind, "* * * may sue therefor in any district court * * * without respect to the amount in controversy, and shall recover threefold the damages by him sustained,"——

Stopping right there. The plaintiff's recovery includes the penalty. This penalty isn't ordered to someone else. No one else is given the right to sue for the penalty. It is recovered by him.

Going ahead: "* * * and the costs of suit, including a reasonable attorney's fee."

No strings on it at all.

You have these cases in the two circuits which you cited to me pointing out that the punitive damages are not to be considered.

Certainly attorneys' fees are not to be trebled. But that is a different thing than saying whether or not a court should consider as part of the result accomplished what was obtained for the [4952] plaintiff.

Now, there are two statutes that come to mind immediately, where there is similar language to this language, and where there have been a number of cases decided involving the question of attorneys' fees. True, they are in smaller amounts, but the principle is the same. One was the Rent Act, which is in Title 50 Appendix USCA, Section 1895. It provided for treble damages, and provided for reasonable attorneys' fees.

There have been a number of cases decided under it, by many circuits, many courts.

You will find far more cases than in this section here, but it is the same language and it is the same problem, and I am interested to see whether the courts in those cases raised the question as to whether in fixing an award to the private litigant for treble damages, they raised this question of the trebling, and the penalty amount, or whether it has only been raised in the cases involving the antitrust act where the verdicts were generally bigger.

The principle should be the same. The amount

should have nothing to do with the principle of law involved.

The second statute that had a similar provision is the Defense Production Act of 1950, which the particular section is 2109 of Title 50, Appendix, USCA. It provided for treble damages and for reasonable attorneys' fees.

That statute, by the way, is still in effect. The rent statute is out. But there are two statutes with similar [4953] language.

Now, to see how Congress knew what they were talking about when they fixed fees, take a few things more. Take the Tort Claims Act. Here was a statute which let a recovery be had against the government itself. It involved no treble damages, but the Congress had no trouble in fashioning a provision for attorneys' fees. They provided, first of all, that the statutory limits on fees, limitations, applied to amounts over $500. As I read it, the door is open for amounts under $500. And I assume that Congress left that to the discretion of the judge. In a recovery of $500 or less, the hands of the court should not be tied.

If it was one of the administrative matters under Section 2672, I think, handled administratively, there was a 10 per cent ceiling; and if it was a court action there was a 20 per cent ceiling. The court could not award more than 20 per cent. But there could be an award of 20 per cent of the amount recovered in an action against the government.

In these cases the Congress provided that these

fees be paid out of the recovery and should not be in addition to the recovery.

In the penalty statutes the fees are expressly set by Congress to be in addition to the treble damages. A very important distinction, indicating this was another penalty which Congress attached to this type of action. [49:54]

By the way, the Tort Claims sections are 28 USCA, 2672, 2678.

Then you have a section on the Japanese claims, claims of the Japanese because of their removal. Again, that is Section 1985.

Mr. Fisher: Is that of 28 USCA?

The Court: Wait a minute. No. 1985 is also in 50 Appendix, USCA.

There was a limit, I think, of 10 per cent awarded in the case of the Japanese claims.

There, also, is a provision for attorneys' fees in the Trading with the Enemy Act, under Section 20 of 50 Appendix USCA. With an exception in cases of a showing of hardship.

So I draw two conclusions. First of all, that Congress seemed to know what they were doing in enacting statutes as to attorneys' fees, and there is no string on attorneys' fees under Section 7 of the Sherman Act, and a similar worded section in the Clayton Act.

The judges in the cases that you have cited have laid down that limitation.

My second point is, I wonder what judges have done with similar sections in the Rent Act and in the Defense Production Act.

I don't like to have you do any more work than you have to on this, but I would appreciate it if you would run down [4955] some of those annotations on those two statutes.

Mr. Fisher: I will be glad to do so.

The Court: Those two sections have treble damages, and reasonable attorneys' fees.

Mr. Dixon: I think the Wage and Hour Law has similar provisions where up to a third is allowed.

The Court: I didn't check that. I had in mind the Wage and Hour Law. What is the maximum allowed there?

Mr. Dixon: A third of the amount recovered.

The Court: That is added on top of the recovery, or does it come out of the recovery?

Mr. Dixon: I believe it comes out of the recovery.

Mr. Walker: I perhaps could speak with authority on that, your Honor, having handled a number of them.

The amount of the award is trebled. The attorneys' fees is added to it. I have seen several actions tried by Judge McCormick here where he allowed a contingent fee of a third, so that the amount awarded to the attorney was exactly the same as the amount of the award—it was a group action—awarded to the plaintiffs.

The Court: That is apparently in line with Judge McCormick's thinking that the attorney fee angle is a penalty, and fits in with his decision mentioned by Clore Warne.

Mr. Reich: Finley against MCA.

The Court: In the Finley case, where although he had to [4956] set aside a recovery award to the plaintiff, he still allowed an attorneys' fee.

Mr. Fowle.

Mr. Fowle: I was simply going to say that there is no trebling under the Fair Labor Standards Act, Mr. Walker. It is double; not treble. I have been in many of those.

Mr. Walker: It has been a number of years since I handled them.

Mr. Fowle: It is an additional equal amount.

Mr. Reich: But Mr. Walker's point is that counsel fees are in addition. It is doubled, instead of being trebled, like under the antitrust law, but counsel fees are in addition to the doubling.

Mr. Fowle: But I know of no case under the Fair Labor Standards Act where I can recall the point is squarely raised as to whether or not the attorneys' fees should be based on the doubled amount or on the actual amount of wages found to be due.

Mr. Walker: I don't recall any, either, Mr. Fowle. I was simply recalling my activity in these courts.

Mr. Reich: I think I cited to you in the memorandum I filed, quoting from Hornstein in the last issue of the Harvard Law Review, in which I think that involved a wage case, but I am not quite certain of it.

The Court: I read it, but it involved a wage case and I [4957] didn't pay too much attention to it at

the time. I didn't get too much help out of it, though.

How soon can you tell me what courts have done in these other cases of treble damages?

Mr. Fisher: I wonder if I might have five days. I have been pretty well occupied with this case.

The Court: If you are going to wait five days, I will have to do it myself, put my law clerk on it.

Mr. Fisher: I could take a lesser amount of time if your Honor directs.

Mr. Cohn: Two days?

The Court: I would suggest that you both take two days on it. This is Monday. Take Tuesday and Wednesday and file it Thursday.

I doesn't have to be detailed.

Maybe you won't find anything.

I could do it myself, but that is what you are supposed to be doing. That is what you get paid for.

Meanwhile the form of this judgment can be revised and re-presented with a blank for the attorneys' fees to the counsel, without allocation between them.

Mr. Dixon: We have a form prepared, your Honor. We will be glad to submit it to them at this time for their consideration. I assume when the judgement is finally entered, that the statements that your Honor has made may be regarded as an [4958] opinion on the question, which would be tantamount to findings of fact, in support of the judgment.

The Court: Is there going to be any request for

any findings of fact, express findings of fact, on this matter of attorneys' fees?

Mr. Fisher: I think not, your Honor.

The Court: Unless there is some other request, I will consider that findings are waived, and the record will be available in connection with my ruling on it.

Do you have the formal judgment that you can serve now?

Mr. Dixon: Yes, we have, your Honor.

The Court: I would suggest that you serve it and get this matter in, and I will make the [4959] award.

* * *

TRANSCRIPT OF HEARING OF MOTION TO SET ASIDE THE VERDICT AND JUDGMENT AND FOR A NEW TRIAL

Monday, March 26, 1956, 10:00 A.M.

The Clerk: No. 11 on the calendar. No. 13788 Civil, Winckler & Smith Citrus Products Company. Hearing motion of defendants to set aside the verdict and judgment, and for a new trial.

Mr. Dixon: Ready for the plaintiff.

The Clerk: Mr. Fisher has handed to me a motion to amend their motion. [4960]

* * *

The Court: It will be deemed the amendment to the motion, without having to redraw the [4961] motion.

* * *

Mr. Fowle: May it please the court, before I begin I would like to point out that in the specifications of places in the record where we made objections, which we filed with the court last Thursday, in the final paragraph of that document we asked leave to make certain corrections by way of amendment in our motion for a new trial, since we found that there had been some errors in respect to transcript references, and so on.

The Court: They may be made.

Mr. Fowle: With respect, if the court please, to this point 16 of our motion for a new trial, which is that the court erred and materially prejudiced defendants by the manner and extent of his participation in the trial in a number of respects, I would like to say, first off, that the defendant does not urge that the court did this deliberately, but the defendants do believe that the court held certain definite views about the merits of this case, and that these views became known to the jury during the course of the trial. The defendants believed actually before the trial had commenced that the court was of the view that the defendants [4962] were wrong.

If there was ever any doubt in the minds of defendants' counsel on this score—and there wasn't, really—this doubt was certainly put to rest on the 11th of January when in chambers your Honor told all of us that the TreeSweet and Silzle contracts were discriminatory and could not be defended, and that you intended to issue an injunction against us irrespective of what the verdict might be.

The Court: That is a legal question. I don't

think there is much factual dispute involved about that. It is a legal question. And I am still of the same frame of mind as to the illegality of the contracts.

There is no dispute of fact about that. The only open fact there was whether or not they had been continued or whether they had been terminated, and I accepted Mr. Fisher's word on that later on.

Mr. Fowle: In any case, your Honor, we would not agree, of course, that those contracts were illegal.

The Court: I know. We are in disagreement. But it is an expression on a legal question in the case.

Mr. Fowle: I was simply mentioning what you had told us. This was on the 11th of January, and it was before the plaintiff's evidence was all in, let alone the defendants' evidence.

The Court: All the evidence was in on the contracts. [4963] There is no dispute about that.

Mr. Fowle: No dispute about the documents themselves.

The Court: That's right

Mr. Fowle: In any event, it is our view, your Honor, that you had strong views about the case, and that in one way or another these views were made known to the jury, despite your admonitions to the jury that you had no views, and that they were not to try to figure out how you felt about the case.

I wish to repeat that we are not complaining that the court deliberately made his views known to the

jury. We are simply complaining that by the manner and extent of the court's participation in the trial, that you actually did make those views known to the jury to the prejudice of the defendants.

Now, the defendants' motion, paragraph 16 of that motion, cites a great many instances where the court did participate in the trial by questioning the witnesses, by commenting on the evidence, and by commenting on the conduct of counsel for the defense. In the main, the defendants would not complain of any single or particular instance of such participation by the court. What the defendants do complain about is the cumulative effect of this participation.

We believe and we in good faith urge that the cumulative effect of the court's participation in the trial was to [4964] prejudice the defendants and to prevent them from having a fair trial.

I realize I have to be brief about this, that there isn't much time, but I would just like to mention two or three or four cases to your Honor. [4965]

* * *

The Court: All right.

I am going to take the motion under submission. I will try to rule on it promptly. [4966]

* * *

TRANSCRIPT OF HEARING ON MOTION TO ADMIT MR. WILLIAMS FOR ORANGE AND SUNKIST

November 30, 1955, 10:00 A.M.

* * *

The Court: I asked you, both sides, to come up this morning in order that I might entertain a motion to admit Mr. Williams for Orange and Sunkist. I also told Mr. Fisher over the telephone that I would waive any formal documents. I see he has some in his hands. The practice around here ordinarily is to entertain these orally.

* * *

The Court: The motion is granted.

I will state very briefly why it is granted.

I have a great deal of respect for Mr. Ross Fisher and the representations he makes to this court. You have made a showing which in your opinion involves the substantial rights of your clients. The personal feelings that I might have one way or the other certainly should bow to the interest of the litigants in this case. I want to see that both this bankrupt plaintiff and these defendants get a fair trial. You feel this man is needed, so I am granting the [4968] motion.

* * *

[Title of District Court and Cause.]

INDEX TO CERTIFIED TRANSCRIPT

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 1836, inclusive, contain the original

Filing Date[1]	Nature of Document
	Flyleaf—Transcript of Record (1)[2]
	Index (2)
2/ 1/52	Complaint for Equitable Relief (3-20)
2/ 8/52	Summons as to All Defendants (21, 22, 23)
2/13/52	Stipulation for Appearance of Sunkist and Ex. O (24, 25, 26)
2/25/52	Stipulation & Order Thereon Extending Time in Which to Plead; O & M (27, 28)
2/25/52	Appearance of Ex. L. & Stipulation Extending Time in Which to Plead (29, 30)
3/13/52	Stipulation & Order Extending Time in Which to Plead; O & M (31, 32)
3/14/52	Plaintiff's Interrogatories (33 to 41)
3/24/52	Notice of Motion to Dismiss Complaint, to Dismiss First, Second, Third, Fourth & Fifth Causes of Action; to Strike Plaintiff's Complaint or Portions & for

[1]Dates and pagination in this index were interpolated by Appellants' Counsel.

[2]District Clerk's pagination on original certified Transcript of Record.

a More Definite Statement (Sunkist & EOP) (42-57)

3/24/52—Plaintiff's Interrogatories Addressed to Tree. (58-65)

3/25/52—Notice of Motion to Dismiss by Tree., to Strike from the Complaint & for a More Definite Statement & Points & Authorities in Support Thereof; T.S. (66-80)

3/25/52—Memorandum of Points & Authorities in Support of Motions of Defendant Exchange Lemon Products Co., in the Alternative (1) to Dismiss the Complaint, (2) to Strike the Complaint or Portions Thereof and (3) for a More Definite Statement; ELP (81-111)

3/25/52—Notice of Motions in the Alternative (1) to Dismiss the Complaint, (2) to Strike the Complaint of Portions Thereof, and (3) for a More Definite Statement; ELP (112-118)

3/26/52—Stipulation Extending Time of Sunkist Growers, Inc., and Exchange Orange Products Co. to Answer Plaintiff's Interrogatories (119-120)

3/27/52—Notice of Motion for Extension of Time to Answer Plaintiff's Interrogatories and of Hearing Objections to Plaintiff's Interrogatories; ELP (121-122)

3/27/52—Objections to Plaintiff's Interrogatories; ELP (123-127)

3/27/52—Memorandum in Support of Motion to Extend Time to Answer Plaintiff's Interrogatories; ELP (128-132)

4/ 3/52—Notice of Objections to Plaintiff's Interrogatories Numbers 11 & 12 & of Motion for Protective Order 3 TS and Affidavit of W. B. Taylor in Support Thereof (133-144)

4/ 3/52—Stipulation & Order Extending Time to Answer Plaintiff's Interrogatories Numbers 1 Through 10 and 13 Through 19, Inclusive; O & M (145, 146)

4/ 4/52—Plaintiff's Memorandum of Points & Authorities in Opposition to Defendants' Motions to Dismiss, etc. (147-183)

4/ 7/52—Plaintiff's Memorandum in Opposition to Motions and Objections re Interrogatories (184-194)

4/14/52—Stipulation & Order re Motions to Dismiss, Alternative, Relief, and Objections to Interrogatories; re cont to 5/5/52 (186, 197)

4/14/52—Minutes of the Court

5/ 3/52—Stipulations re Objection of Exchange Lemon Products Co. to Plaintiff's Interrogatories (199, 200)

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5/ 9/52—Stipulations & Order Putting Hearing on Interrogatories off Calendar (201, 202)

5/ 9/52—Waiver of Notice Required by Rule 24(c) of F.R.C.P.; Ptf. (203)

5/ 9/52—Petition of Ronald Walker, Trustee (204-207)

5/ 9/52—Order Permitting Intervention and Amending Caption; Petition of Ronald Walker; Waiver of Notice (208, 209)

5/12/52—Order re Motions heard May 5, 1952 (211-214)

5/12/52—Minutes of the Court

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5/26/52—Defendant TreeSweet Products Co. Answers to Plaintiff's Interrogatories 1 Through 10, and 13 Through 19, Inclusive (225-264)

5/26/52—Answer of Sunkist Growers, Inc., and Exchange Orange Products (265-283)

5/26/52—Sunkist Growers, Inc., and Exchange Orange Products Co. Answers to Plaintiff's Interrogatories Dated March 14, 1952 (284-401)

5/26/52—Answer of Exchange Lemon Products Co. to Complaint (402-411)

5/26/52—Answers of Exchange Lemon Products Co. to Plaintiff's Interrogatories (412-446)

5/28/52—Jury Demand (447, 448)

5/28/52—Notice of Deposition; & Affidavit of Service (449, 450), Deposition of Winckler (451, 452)

5/26/52—Deposition Subpoena to Ronald Walker 453

5/26/52—Affidavit of Service by Mail of Notice of Deposition on Irwin (454, 455)

6/16/52—Interrogatories Propounded to Plaintiff

& Intervenor by Sunkist Growers, Exchange Orange Products Co. and Tree-Sweet Products Co. (457-485)

6/16/52—Minutes of the Court

6/17/52—Stipulation Extending Time to Object, Answer or Otherwise Plead to Interrogatories dated June 12, 1952 (486-488)

6/30/52—Order re Local Rule 4(e) & Affidavit in Support Thereof (489-492)

7/ 9/52—Statement in Support of the Motion of Exchange Lemon Products for Discovery and Production of Documents Under Rule 34 (493-503)

7/ 9/52—Affidavit of Melville C. Williams in Support of Motion for Discovery & Production of Documents Under Rule 34 by Defendant Exchange Lemon Products Co. (504-508)

7/ 9/52—Motion for Discovery and Production of Documents Under Rule 34 (509-514)

7/ 9/52—Notice of Motion for Discovery and Production of Documents Under Rule 34 (515-518)

7/13/52—Reply Memorandum of Defendant Exchange Lemon Products Company to Plaintiff's Statement of Reasons in Opposition to Said Defendant's Motion Under Rule 34 (569-580)

7/14/52—Statement of Reasons in Opposition to Defendant ELP's Motion for Discovery and Production of Documents Under Rule 34; Affidavit in Opposition; Memo-

randum of Points and Authorities in Opposition (Reich) (519-545)

7/14/52—Notice of Motion to Suppress, and Notice of Hearing on General Objections to Interrogatories Propounded to Plaintiff and Intervener by Defendants Sunkist, EOP and TreeSweet; Affidavits, and Memorandum of Points and Authorities in Support Thereof (546-568)

7/21/52—Stipulation Extending Time of Defendants Sunkist Growers, Inc., a Corporation, The Exchange Orange Praducts Co., and TreeSweet Products Co., to Serve and File Memorandum of Points and Authorities, Affidavits and Other Documents in Opposition to Plaintiffs' Motion to Suppress the Interrogatories Propounded to Plaintiff and Intervener by Said Defendants (581-583)

8/15/52—Plaintiff and Intervener's Supplemental Memorandum in Opposition to ELP's Motion Under Rule 34 (584-597)

8/15/52—Answer to Plaintiff's General Objections to Interrogatories Propounded by Defendants Sunkist Growers' Inc., The Exchange Orange Products Co., and TreeSweet Products Co. to Plaintiff, Affidavit of F. R. Wilcox and Memorandum of Points and Authorities (598-620)

8/19/52—Reply Memorandum Re Plaintiff and Intervener's Motion to Suppress Interrogatories (621-632)

8/30/52—Reply of Defendant Exchange Lemon Products Co. to Plaintiff and Intervener's Supplemental Memorandum Re Motion Under Rule 34 (633-637)

9/ 8/52—Minutes of the Court

10/ 8/52—Plaintiff and Intervener's Objections to Proposed Order on Defendants' Motion Re Rules 33 and 34 (639-642)

10/15/52—Plaintiff and Intervener's Supplemental Objections to Proposed Order on Defendants' Motion Re Rules 33 and 34 (643-645)

10/30/52—Order for Production of Documents Requested in Motion of Defendant Exchange Lemon Products Co. Under Rule 34, and Granting Plaintiff's Motion to Suppress Interrogatories of Defendants Sunkist, EOP and TreeSweet (646-651)

12/ 9/52—Substitution of Attorneys by Defendant Exchange Lemon Products Co. (652-653)

12/29/52—Defendant Exchange Lemon Products Co.'s Request for Admissions Under Rule 36 (654-657)

12/29/52—Interrogatories Propounded by Defendant Exchange Lemon Products Co. (657-676)

12/29/52—Affidavit of Mailing Interrogatories and Request for Admissions (677, 678)

1/ 5/53—Stipulation Re Interrogatories and Admissions; Order (679)

3/ 4/53—Stipulation and Order Thereon; Reich Re Interrogatories (680, 681)

3/ 4/53—Stipulation and Order Thereon; Reich Re Interrogatories 3/13/53 (681 A & B)

3/10/53—Notice of Motion by Defendant Exchange Lemon Products Co. Under Rule 37 (682-684)

3/10/53—Statement and Reasons and Authorities in Support of Motion by Defendant Exchange Lemon Products Company Under Rule 37 (685-687)

3/10/53—Affidavit of Donald D. Stark in Support of Motion Under Rule 37 (688-690)

3/13/53—Plaintiff and Intervener's Answers to Defendant Exchange Lemon Products Co.'s Requests for Admissions Under Rule 36 (691-696)

3/13/53—Plaintiff and Intervener's Answers to Interrogatories Propounded by Defendant Exchange Lemon Products Co. (With Objections to Certain of the Interrogatories (697-751)

3/16/53—Affidavit of Bernard Reich in Opposition to Motion Under Rule 37 (752-770)

3/16/53—Reasons and Answering Memorandum of Points and Authorities in Opposition to Motion of Defendant Exchange Lemon Products Company Under Rule 37 (771-774)

3/20/53—Reply Memorandum by Defendant Exchange Lemon Products Company Re Motion Under Rule 37 (775-781)

3/23/53—Minutes of the Court

3/25/53—Notice of Motion to Be Relieved of Portion of Stipulation and Order Thereon (783-785)

3/25/53—Affidavit of Bernard Reich in Support of Motion to Be Relieved in Part of Stipulation and Order, and for Order Shortening Time (786-790)

3/25/53—Order Shortening Time for Hearing on Motion to Be Relieved (791)

3/27/53—Reply Memorandum ELP and Affidavit in Opposition to Motion of Plaintiff and Intervener Re Relief From Order (792-798)

3/30/53—Minutes of the Court

4/18/53—Notice Withdrawing Plaintiff's Motion Returnable April 20, 1953 (800, 801)

4/18/53—ELP Notice of Withdrawal of Motion Under Rule 37 (802, 803)

4/20/53—Minutes of the Court

7/ 7/53—Notice of Motion and Motion to Compel Plaintiff and Intervener to Answer the Interrogatories Served Upon Them by Defendant Exchange Lemon Products in Accordance With Rule 33 (805-828)

7/13/53—Plaintiff and Intervener's Reasons and Memorandum of Points and Authorities in Opposition to Defendant ELP's Motion Re Its Interrogatories (829-844)

7/20/53—Minutes of the Court

8/ 4/53—Plaintiff and Intervener's Additional Answers to Interrogatories Propounded

by Defendant Exchange Lemon Products Company (With Objections to Certain of the Interrogatories) (846-875)

2/ 2/54—Minutes of the Court

2/ 9/54—Notification of Date for Setting (877)

2/19/54—Notice of Motion by Defendants Sunkist Growers, Inc., The Exchange Orange Products Co. and Exchange Lemon Products Co. for Discovery and Production of Documents Under Rule 34 (878-898)

2/20/54—Interrogatories Propounded by Defendants Sunkist Growers, Inc., The Exchange Orange Products Company and Exchange Lemon Products Co. (899-901)

2/20/54—Notice of Motion, Statement of Grounds and Points and Authorities in Support of Motion Under Rule 37 to Compel Plaintiff and Intervener Further to Answer Certain Interrogatories Served Upon Them by Defendant Exchange Lemon Products Co. (902-907)

2/23/54—Statement in Opposition to Motion Under Rule 37 to Compel Plaintiff to Make Further Answers to Interrogatories (908-910)

2/23/54—Statement in Opposition to Defendants' Motion for Discovery Under Rule 34; Points and Authorities (911-916)

2/23/54—Notice of Motion for Discovery Under Rule 34 of the Federal Rules of Civil

Procedure; Affidavit; Memorandum (917-929)
2/23/54—Notice of Motion to Suppress Interrogatories Propounded by Defendants; Objections and Memorandum (930-935)
2/23/54—Notice of Motion for Further Answers to Plaintiff's Interrogatories; Affidavit (936-943)
3/ 1/54—Minutes of the Court
3/ 1/54—Defendants' Memorandum of Points and Authorities Opposing Plaintiff's Motion for Discovery Under Rule 34 (945-957)
3/ 1/54—Substitution of Attorneys by Defendant Exchange Lemon Products Co. (958-960)
3/ 1/54—Memorandum of Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company in Opposition to Plaintiff's Motion for Further Answers to Plaintiff's Interrogatories (961-964)
3/ 4/54—Plaintiff's Reply Memorandum Re Motion for Discovery Under Rule 34 (965-972)
3/ 4/54—Plaintiff's Reply Memorandum Re Plaintiff's Motion for Further Answers (973-976)
3/ 6/54—Affidavit of Ross C. Fisher Amending Affidavit of Ross C. Fisher in Support of Motion for Discovery and Production of Documents Under Rule 34 Filed Herein February 19, 1954 (977-982)
3/ 8/54—Minutes of the Court
3/ 8/54—Order for Pretrial Hearing (985)

3/11/54—Minutes of the Court

4/12/54—Designation of Categories to Be Excluded from Supplemental Order for Production of Documents Pursuant to Plaintiff's and Intervener's Motion Under Rule 34 (987-991)

4/19/54—Minutes of the Court

4/19/54—Objections to Proposed Order for Discovery and Production of Documents Under Rule 34 Pursuant to Motion by Defendants (993-995)

4/20/54—Order for Discovery and Production of Documents Under Rule 34 Pursuant to Motion by Defendants Sunkist Growers, Inc., The Exchange Orange Products Company and Exchange Lemon Products Company (996-1004)

4/21/54—Memorandum Re Objections to Categories 14, 15, 16 and 17 of Plaintiff's Motion Under Rule 34 (1005-1007)

4/26/54—Order in Accordance With Motion for Further Answers to Plaintiff's Interrogatories Addressed to Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company (1008, 1009)

4/26/54—Stipulation Re Hearing on Categories (1010-1012)

4/27/54—Objections ELP to Form of Order Submitted by Plaintiff and Intervener (1013-1020)

4/27/54—Objections of Defendants Sunkist Growers, Inc., and The Exchange Orange

Products Company to Plaintiff's Proposed Order for Production of Documents Pursuant to Plaintiff and Intervener's Motion Under Rule 34 (1021-1027)

4/27/54—Plaintiff and Intervener's Memorandum in Support of Form of Order on Their Motion Under Rule 34 (1028-1031)

4/29/54—Plaintiff and Intervener's Second Memorandum in Support of Form of Order on Their Motion Under Rule 34 (1032-1034)

5/ 3/54—Minutes of the Court

5/10/54—Minutes of the Court

5/10/54—Order Granting Motion of Defendant Exchange Lemon Products Company Under Rule 37 (1037-1039)

5/10/54—Order Denying Plaintiff and Intervener's Motion to Suppress and Overruling Objection to Interrogatories (1040-1042)

5/14/54—Objection to Form of Proposed Order, ELP (1043, 1044)

5/14/54—Objection to Form of Proposed Order, Sunkist (1045-1049)

5/17/54—Order for Production of Documents Pursuant to Stipulation (1050-1055)

5/17/54—Supplemental Order Re Production of Documents Pursuant to Plaintiff and Intervener's Motion Under Rule 34 (1056-1059)

5/17/54—Minutes of the Court

Notice of Hearing; Motion for Leave to

Compromise Petition; and Walker Petition for Fees T/S (1061-1065)
Affidavit of Service by Mail of Notice of Hearing and Motion to Fix Fees (1066, 1067)

7/19/54—Minutes of the Court

7/26/54—Minutes of the Court

7/29/54—Order Approving Compromise of Action No. 13788-C as Against Defendant Tree-Sweet Products Co. (1070, 1071)

9/30/54—Minutes of the Court

11/12/54—Pretrial Brief of Defendants Sunkist Growers, Inc., and The Exchange Orange Products Co. (1073-1097)

11/12/54—Pretrial Brief of Defendant Exchange Lemon Products Company (1098-1101)

11/15/54—Minutes of the Court

11/24/54—Minutes of the Court

12/14/54—Amended Complaint for Equitable Relief (1104-1124)

1/ 3/55—Stipulation and Order Extending Time to Plead to Amended Complaint (1125-1126)

1/ 3/55—Stipulation for Dismissal and Order Thereon (Re TreeSweet) (1127, 1128)

1/27/55—Notice of Motion and Motion of Defendant Exchange Lemon Products Co. (1) to Strike Portions of the Amended Complaint, and (2) for a More Definite Statement (1129-1137)

1/27/55—Memorandum of Points and Authorities of Defendant Exchange Lemon Products

Co. in Support of Its Motion in the Alternative (1) to Strike Portions of the Amended Complaint and (2) for a More Definite Statement (1138-1161)

1/28/55—Notice of Motion of Defendants Sunkist Growers, Inc., and The Exchange Orange Products Co. in the Alternative (1) to Strike Portions of the Amended Complaint and (2) for a More Definite Statement (1162-1176)

2/ 3/55—Brief of Plaintiff and Intervening Trustee in Opposition to Motions of Defendants to Strike and for a More Definite Statement (1177-1185)

2/ 9/55—Reply Memorandum of Defendant Exchange Lemon Products Company in Support of Its Motion to Strike Portions of the Amended Complaint and for a More Definite Statement (1186-1192)

2/10/55—Brief of Defendants Sunkist Growers, Inc. (Sunkist), and The Exchange Orange Products Company (EOP) in Reply to Brief of Plaintiff and Intervening Trustee in Opposition to Motions of Defendants to Strike and for a More Definite Statement (1193-1200)

2/14/54—Minutes of the Court (1201)

2/18/55—Answer of Defendant Exchange Lemon Products Company to the Amended Complaint (1202-1211)

2/21/55—Answer of Defendants Sunkist Growers, Inc., a Corporation, Sued Herein as Cali-

fornia Fruit Growers Exchange, and The Exchange Orange Products Company, to Plaintiff's and Trustee and Intervener's Amended Complaint (1212-1231)
3/ 1/55—Minutes of the Court (1232)
5/25/55—Minutes of the Court (1233)
5/26/55—Minutes of the Court (1234)
5/27/55—Minutes of the Court (1235)
5/31/55—Minutes of the Court (1236)
6/ 1/55—Minutes of the Court (1237)
6/ 2/55—Minutes of the Court (1238)
7/ 1/55—Notice of Motion to Permit Ferris E. Hurd and Thomas C. Strachan Jr., Non-resident Attorneys, to Appear and Participate in This Action (1239-1258)
7/11/55—Minutes of the Court
7/27/55—Findings of Fact and Conclusions of Law (1260-1293)
7/27/55—Order Revoking Special Admission of Attorney Melville C. Williams (1264)
8/24/55—Notice of Appeal Filed August 24, 1955 (1267, 1268)
Bond on Appeal (1265, 1266)
9/ 6/55—Certificate of Service of Designation by Melville C. Williams of Contents of Record on Appeal (1269)
8/31/55—Designation by Melville C. Williams of Contents of Record on Appeal (1270-1273)
10/ 3/55—Order Extending Time for Filing Record and Docketing Appeal (1274)
10/ 3/55—Ex Parte Motion of Melville C. Williams

for Order Extending Time for Filing Record on Appeal and Docketing Appeal (1275-1278)
10/18/55—Minutes of the Court (1279)
10/21/55—Trial Brief (1280-1315)
11/ 2/55—Subpoena Duces Tecum (1316)
11/ 2/55—Civil Subpoena; Re Thelma Silzle, Robert Clark (1317-1320)
11/ 2/55—Subpoena Duces Tecum (1321)
11/ 2/55—Civil Subpoena; Re Sam H. Kelly (1321)
11/ 2/55—Subpoena Duces Tecum (3) (1322-1330)
11/ 2/55—Civil Subpoena; Re Wendell K. McCracken (1322-1330)
11/ 2/55—Subpoena Duces Tecum (1322-1330)
11/ 2/55—Notice of Motion and Motion for Continuance of Trial Date; Statement of Reasons in Support and Authority for Motion (1331-1337)
11/ 3/55—Minutes of the Court (1338)
11/23/55—Defendants' Trial Memorandum (1339-1362)
11/28/55—Certificate Copy of Order of U. S. Court of Appeals for the Ninth Circuit, Dated November 25, 1955, for Continuance of the Trial, etc. (1363, 1364)
11/29/55—Minutes of the Court (1365)
11/30/55—Motion of Defendants Sunkist Growers, Inc., and the Exchange Orange Products Company to Permit Melville C. Williams to Appear and Participate in This Action (1366-1378)
11/30/55—Minutes of the Court (1379)

12/ 1/55—Order of Dismissal (1380, 1381)
12/ 7/55—Jury Instructions Requested by Plaintiffs (1382-1424)
12/ 7/55—Minutes of the Court (1425)
12/13/55—Request to Court for Special Questions to Prospective Jurors (1426, 1427)
12/13/55—Motion by Sunkist Growers, Inc., and the Exchange Orange Products Co. to Dismiss the Fourth and Fifth Causes of Action (1428-1431)
12/13/55—Defendants' Memorandum re the Statute of Limitations and the Silzle Contract (1432-1443)
12/13/55—Minutes of the Court (1444)
12/14/55—Minutes of the Court (1445)
12/15/55—Minutes of the Court (1446)
12/16/55—Minutes of the Court (1447)
12/20/55—Minutes of the Court (1448)
12/21/55—Minutes of the Court (1449)
12/22/55—Minutes of the Court (1450)
12/27/55—Civil Subpoenas re Morgan Ward and Robert Hodge (1451, 1452)
12/28/55—Minutes of the Court (1453)
12/29/55—Minutes of the Court (1454)
12/30/55—Minutes of the Court (1455)
1/ 3/56—Memorandum in Support of Winckler's Correspondence With Brokers (1456-1462)
1/ 3/56—Minutes of the Court (1463)
1/ 4/56—Minutes of the Court (1464)
1/ 5/56—Minutes of the Court (1465)
1/ 6/56—Minutes of the Court (1466)

1/10/56—Jury Instructions Requested by Defendants (1467-1535)

1/11/56—Minutes of the Court

1/11/56—Note from Jury to Court; re Visit Plant (1538)

1/12/56—Subpoena Duces Tecum; to Morgan Ward (1539)

1/12/56—Minutes of the Court

1/13/56—Minutes of the Court

1/17/56—Motion of Defendants for a Directed Verdict at the Close of Plaintiff's Case (1540-1545)

1/17/56—Minutes of the Court

1/18/56—Minutes of the Court

1/19/56—Minutes of the Court

1/20/56—Minutes of the Court

1/24/56—Minutes of the Court

1/25/56—Minutes of the Court

1/26/56—Minutes of the Court

1/27/56—Minutes of the Court

1/30/56—Civil Subpoenas re Mr. Ned Lewis, Guy L. Levingston, D. V. Brown, Ray Wells, John H. Arnold, Dwight C. Baun, H. E. Asher, George W. Palug-Selder, P. Covington, Myron Kunin, E. J. Evans (1556-1567)

1/31/56—Motion of Defendants for Leave to Amend Their Answers to the Amended Complaint (1568-1578)

1/31/56—Amendment of Answer of Sunkist Growers, Inc., and the Exchange Orange

Products Company to Amended Complaint (1579-1581)

1/31/56—Motion (Ptf) to Amend Amended Complaint to Conform to the Evidence (1582-1587)

1/31/56—Minutes of the Court

2/ 1/56—Minutes of the Court

2/ 2/56—Minutes of the Court

2/ 2/56—Second Amended Complaint for Equitable Relief and Treble Damages Under the Federal and California Antitrust Laws (1590-1604)

2/ 3/56—Minutes of the Court

2/ 4/56—Minutes of the Court

2/ 6/56—Minutes of the Court

2/ 7/56—Minutes of the Court

2/ 7/56—Answer of Sunkist Growers, Inc., and the Exchange Orange Products Co., to Plaintiff's and Trustee and Intervener's Second Amended Complaint (1610-1627)

2/ 7/56—Defendants' Request for Interrogatories to Jury (1628-1630)

2/ 8/56—Minutes of the Court

2/ 9/56—Minutes of the Court

2/ 9/56—Note from Jury to Court; re Use of Notes (1634)

2/10/56—Verdict to the Jury (1635 & 1637) (2)

2/10/56—Minutes of the Court

2/13/56—Application for Allowance of Attorneys' Fees (1638-1651)

2/13/56—Application of Frank F. Fowle for Per-

mission to Appear and Participate in this Action (1652-1655)

2/13/56—Minutes of the Court

2/16/56—Brief in Support of Application for Attorneys' Fees (Dixon) (1657-1660)

2/17/56—Notice of Motion of Sunkist Growers, Inc., the Exchange Orange Products Co., for Judgment in Accordance With Said Defendants' Motion for a Directed Verdict at the Close of All the Evidence in the Trial of the above-entitled Action (1661-1670)

2/20/56—Affidavit of Service by Mail Filed (1671-1673)

2/20/56—Plaintiff's and Intervener's Supplemental Memorandum on Attorneys' Fees (1674-1676)

2/23/56—Answer to Plaintiff's Application for Allowance of Attorneys' Fees and Points and Authorities in Support of Said Answer (1677-1693)

2/24/56—Minutes of the Court

2/27/56—Minutes of the Court

2/29/56—Memorandum re Counsel Fees (Dixon) (1696-1699)

3/ 1/56—Defendants' Supplemental Memorandum of Points and Authorities on Attorneys' Fees (1700-1706)

3/ 2/56—Plaintiffs' Memorandum on "A Reasonable Attorney's Fee" (1707-1710)

3/ 5/56—Clerk's Notice Final Judgment (1711)

3/ 5/56—Final Judgment (1712-1714)

3/ 5/56—Minutes of the Court
3/ 5/56—Memorandum to Counsel (1716-1718)
3/ 9/56—Minutes of the Court
3/ 9/56—Cost Bill (1720-1722)
3/12/56—Minutes of the Court
3/14/56—Order Expunging from the Records of This Court the Order Entered July 28, 1955, Re: Melville C. Williams and the Findings of Fact and Conclusions of Law Pertaining Thereto (1725, 1726)
3/14/56—Mandate of the Court of Appeals for the Ninth Circuit dated March 5, 1956 (1727, 1728)
3/14/56—Notice of Motion of Sunkist Growers, Inc., and the Exchange Orange Products Co., to Set Aside the Verdict and Judgment Herein and for a New Trial (1729, 1730)
3/14/56—Motion of Sunkist Growers, Inc., and the Exchange Orange Products Co., to Set Aside the Verdict and Judgment Herein and for a New Trial (1731-1771)
3/15/56—Order (1772, 1773)
3/16/56—Memorandum of Points and Authorities in Support of Sunkist Growers, Inc., and the Exchange Orange Products Company's Motion to Set Aside the Verdict and Judgment Herein and for a New Trial, filed March 14, 1956 (1774-1787)
3/20/56—Minutes of the Court
3/22/56—Reply Brief in Opposition to Motions

for Judgment Notwithstanding Verdict and for a New Trial (1789-1791)
3/22/56—Clerk's Letter re Taxing Costs (1792)
3/22/56—Specifications of Objections, Pursuant to Order of March 15, 1956 (1793-1803)
3/26/56—Motion of Defendants for Leave to Amend Their Motion for a New Trial by Adding Thereto a Paragraph 20 (1804-1807)
3/26/56—Minutes of the Court
3/30/56—Minutes of the Court
4/11/56—Notice of Motion of Defendants Sunkist Growers, Inc., and the Exchange Orange Products Co., for Leave to File Affidavit of Thomas C. Strachan, Jr., Esq., dated April 9, 1956 (1810, 1811)
4/11/56—Motion of Defendants Sunkist Growers, Inc., and the Exchange Orange Products Co., for Leave to File Affidavit of Thomas C. Strachan, Jr., Esq., dated April 9, 1956 (1812, 1813)
4/11/56—Affidavit of Thomas C. Strachan, Jr., dated April 9, 1956 (1814-1818)
4/12/56—Minutes of the Court
4/16/56—Minutes of the Court
4/27/56—Notice of Appeal to Court of Appeals for the Ninth Circuit (1821-1823)
5/22/56—Appellant's Designation of Contents of Record on Appeal (1824-1829)
5/24/56—Motion for Extension of Time for Filing Record on Appeal and Docketing Appeal (1830-1833)

5/24/56—Order Extending Time for Filing Record and Docketing Appeal (1834-1836)
Copy of all docket entries
Copy of Notification of Transfer dated February 2, 1954 (876)
Notification of Entry of Order Dismissing Defendant Exchange Lemon Products Co., dated December 1, 1955 (1382)
Notification of Entry of Final Judgment dated March 5, 1956 (1711)
Notification of Entry of Order Expunging from the Records Order Entered July 28, 1955, dated March 14, 1956 (1454)
58 volumes of Reporter's Transcript of Proceedings and Plaintiff's Exhibits 1 through 84A, inclusive, and Defendants' Exhibits A through FJ, inclusive.

Witness my hand and seal of the said District Court this 22nd day of August, 1956.

JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15242. United States Court of Appeals for the Ninth Circuit. Sunkist Growers, Inc., a Corporation, and The Exchange Orange Products Company, a Corporation, Appellants, vs. Winckler & Smith Citrus Products Co., a Corporation, and Ronald Walker, Trustee, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 27, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15242

SUNKIST GROWERS, INC., a Corporation, and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation, and RONALD WALKER, as Trustee of Winckler & Smith Citrus Products Co.,

Appellees.

APPLICATION BY APPELLANTS FOR AN EXTENSION OF TIME FOR FILING RECORD AND DOCKETING APPEAL AND FOR FILING DESIGNATION OF RECORD AND STATEMENT OF POINTS AS REQUIRED BY RULE 17(6) OF THE RULES OF THIS COURT

Appellants above named, pursuant to Rule 37 of the Rules of the United States Court of Appeals for the Ninth Circuit, apply to the court for an order extending the time for filing the record and docketing the appeal from July 26, 1956, to and including August 26, 1956, and for an order extending the time to and including September 26, 1956, within which they may file their statement of points on which they intend to rely and designation of that

part of the record material to the consideration of their points.

This application is based upon the Rules of this Court, the annexed affidavit of Ross C. Fisher, and the files and records of this Court in this action.

Dated July 13, 1956.

/s/ ROSS C. FISHER,
On Behalf of Appellants Sunkist Growers, Inc., and The Exchange Orange Products Company.

[Title of Court of Appeals and Cause.]

AFFIDAVIT OF ROSS C. FISHER IN SUPPORT OF APPLICATION BY APPELLANTS FOR AN EXTENSION OF TIME FOR FILING RECORD AND DOCKETING APPEAL AND FOR FILING DESIGNATION OF RECORD AND STATEMENT OF POINTS AS REQUIRED BY RULE 17(6) OF THE RULES OF THIS COURT

State of California,
County of Los Angeles—ss.

Ross C. Fisher, being first duly sworn, on oath deposes and says:

1. He is a member of the bar of this Honorable Court, and one of the attorneys for appellants Sunkist Growers, Inc., and The Exchange Orange Products Company in the above-entitled action.

2. He is familiar with the record on appeal in the above case, which consists of nearly 5,000 pages of transcript of proceedings had after commencement of trial, in excess of 200 admitted exhibits and other exhibits offered and rejected, and several hundred pleadings, motions, orders, memoranda, transcript of pretrial arguments, affidavits, etc., filed with the Clerk of the United States District Court for the Southern District of California, Central Division, since the commencement of the action.

3. Appellants filed their notice of appeal on April 27, 1956. On May 22, 1956, appellants filed their designation of contents of record on appeal designating the complete record and all of the proceedings and evidence in the action. On May 24, 1956, appellants secured an order from the District Court extending the time for filing the record and docketing the appeal to July 26, 1956. Notwithstanding this extension of time, he is advised by the Clerk of the United States District Court that due to the pressure of other work and the vacation schedule in the Clerk's office, the Clerk's office has not been able to commence the preparation of the record on appeal, and it is doubtful whether the Clerk of the District Court will be able to prepare and file the record and to docket the appeal by July 26, 1956, and said Clerk has requested affiant to secure an extension of time to and including August 26, 1956, in which to file the record on appeal and docket the appeal.

4. In order to comply with Rule 17(6) of the Rules of this Court, counsel for appellants are undertaking diligently to eliminate all portions of the record not necessary to decision on the errors to be specified. The burden of this work is onerous due to the size of the transcript of proceedings and the number of exhibits and pleadings, and also because some of counsel for appellants are located in Chicago, Illinois.

5. It is the opinion of affiant and of the other counsel for appellants that it will not be possible adequately to analyze the record and to prepare the statement of points and designation for printing within the time specified in Rule 17(6) of the Rules of this Court.

Affiant respectfully requests, on behalf of appellants, that the time for filing the record on appeal and docketing the appeal be extended to and including August 26, 1956, and that the time within which appellants may file their statement of points upon which they intend to rely and their designation of that part of the record material for the consideration of the appeal, be extended to and including September 26, 1956.

/s/ ROSS C. FISHER.

Subscribed and Sworn to before me this 13th day of July, 1956.

[Seal] /s/ STEPHEN M. FARRAND,
Notary Public in and for the County of Los Angeles,
State of California.

ORDER

So Ordered July 16, 1956.

/s/ ALBERT LEE STEPHENS,
Judge, United States Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed July 17, 1956.

[Title of Court of Appeals and Cause.]

JOINT AND SEVERAL STATEMENT BY APPELLANTS OF POINTS ON WHICH THEY INTEND TO RELY

Appellants above named jointly and severally make the following joint statement of the points on which they intend to rely on the appeal herein:

1. The court erred in denying the appellants' and each of their motions for a directed verdict at the close of the appellees' case.

2. The court erred in denying appellants' and each of their motions for a directed verdict at the close of all of the evidence.

3. The court erred in entering judgment on the verdict of the jury.

4. The court erred in denying appellants' and each of their motions for a judgment in their favor notwithstanding the verdict.

5. The court erred in denying appellants' and each of their motions for a new trial.

Each appellant will urge as to each of the foregoing points each and all of the grounds asserted in their said motions.

6. The evidence is insufficient to support the verdict of the jury or the judgment based thereon. It is also insufficient to support any finding of fact, implied or imported by the verdict, in each of the following respects:

(a) That the defendants, or either of them, conspired, combined or agreed or did any other act in violation of the antitrust laws.

(b) That plaintiffs were, or either of them was, damaged or injured by or as the result of any act or acts of appellants, or either of them, in violation of the antitrust laws.

(c) That defendants were not, or that either of them was not, or that any of their acts were not within the exemptions from the antitrust laws accorded by the Capper-Volstead Act and related legislation.

(d) That any public injury resulted from any act or acts of the defendants, or either of them.

(e) That plaintiffs were, or either of them was, damaged or injured in the amount found by the jury or in any amount.

7. The court erred in overruling and denying appellants' plea of the statute of limitations and of laches.

8. The court erred in granting plaintiffs leave to file a second amended complaint and a second amended complaint as amended.

9. The court erred in denying appellants leave to file an amended answer.

10. The court erred in bringing or permitting to be brought into the case the issue of price fixing by appellants, although that issue had not been raised or tendered by any of the parties.

11. The court committed substantial and prejudicial errors of law in the course of the trial in connection with the admission and exclusion of evidence, as follows:

(a) Excluding evidence offered by appellants and tending to show that plaintiff's product was poor, adulterated, unsanitary and generally unsatisfactory, and that its methods of operation were inefficient, obsolete and wasteful.

(b) Excluding evidence offered by appellants and tending to show that appellants had information of the poor, adulterated, unsanitary and unsatisfactory nature of plaintiff's product and of its inefficient, obsolete and wasteful methods of operation, and gave consideration and effect to that information in determining whether to have business relations with plaintiff.

(c) Admitting irrelevant and inadmissible evidence offered by appellees designed to show price fixing by appellants.

(d) Admitting irrelevant and inadmissible evidence offered by appellees designed to show agreements which were not claimed or shown to have injured appellees, or either of them, or which were not claimed or shown to have been part of any conspiracy, combination, agreement or act in violation of the antitrust laws.

(e) Excluding and limiting the nature and extent of evidence offered by appellants tending to rebut and negate the accounting and fianancial evidence, theories and exhibits offered by plaintiff to show damages.

(f) Limiting the period of time in respect of which appellants were permitted to offer evidence as to the financial condition of plaintiff corporation; and excluding evidence offered by appellants tending to show that plaintiff's losses were caused by its poor financial condition and by transactions engaged in by the plaintiff corporation or its representatives rather than by any act of appellants or either of them.

(g) Excluding evidence offered by appellants of plaintiff corporation's income tax returns, applications for permits to issue its securities, and of its letters, all containing admissions relevant and material to the issues, and excluding letters from brokers and customers of plaintiff corporation offered to show their state of mind with regard to plaintiff's products.

(h) Limiting and curtailing unduly the cross-

examination of plaintiffs' witnesses, Nicholas J. Winckler and Robert Hodge.

(i) Not permitting the jury to consider as a question of fact the evidence relating to the effect upon plaintiff corporation and its financial condition of its reorganization under Chapter XI of the Bankruptcy Act and the transactions which occurred therein or in connection therewith or as a result thereof.

(j) Excluding evidence offered by appellants tending to show reasonable business justification for the alleged refusal or failure to deal with plaintiff corporation.

(k) Excluding evidence offered by appellants tending to show the nature, extent and area of the market and the products embraced within that market in respect of which the acts and conduct of appellants or either of them should be judged.

(l) Excluding evidence offered by appellants tending to show that plaintiff's business was conducted in an illegal manner.

(m) Excluding evidence offered by appellants tending to show that appellees came into court with unclean hands.

(n) Permitting witnesses called by plaintiff (Winckler and Hodge) to testify to hearsay, conclusions and opinions, and to argument.

(o) In addition, in ruling on the admission and exclusion of evidence in each of the respects specified in paragraphs 10 and 11 of defendants' motion

to set aside the verdict and judgment and for a new trial.

(p) The cumulative effect of the foregoing rulings on admission and exclusion of evidence was to deny appellants a fair trial.

12. The court committed substantial and prejudicial errors of law in the course of the trial in connection with its instructions to the jury, as follows:

(a) Giving plaintiffs' requested instructions Nos. 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 15, 19, 23, 25, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38.

(b) Refusing to give defendants' requested instructions Nos. A, B, 2, 4, 5, 6, 8, 9, 9A, 9a, 10, 11, 12, 13, 14, 14A, 14B, 16, 16B, 18, 20, 21, 22, 23, 24, 25, 25B, 25-1, 25D, 34, 35, 36A, 41, 43, 44, 45.

(c) Modifying defendants' requested instructions Nos. 7, 15, 16A, 17A, 39.

(d) Giving on its own motion the court's instructions identified as B, D, E, F, J, K, N, P, Q, R, and Civil 12A, 12B.

(e) In the instruction given the jury, after it had retired, in response to the jury's request to repeat that portion of the charge identified in the record as court's B.

13. The court erred in its determination of the effect of the payment of $2,500 to appellee by a former defendant in this action in consideration of the execution by appellee of a covenant not to sue.

14. The court erred in failing to give full effect to the dismissal of the cause as to defendants who were alleged to be co-conspirators and joint tort feasors with appellants.

15. The court erred in fixing the amount awarded to appellees in respect of their attorneys' fees.

16. Further errors in law were committed at the trial by the judge and there were irregularities in the proceedings and abuses of discretion by the judge by which appellants and each of them were prevented from having a fair trial, and particularly in the respects specified in paragraphs 16 and 20 of defendants' motion to set aside the verdict and judgment and for a new trial.

Dated September 21, 1956.

ROSS C. FISHER,
HERMAN F. SELVIN,
THOMAS C. STRACHAN, JR.,
FRANK F. FOWLE,
MELVILLE C. WILLIAMS,

By /s/ ROSS C. FISHER,
Attorneys for Appellants Sunkist Growers, Inc., and The Exchange Orange Products Company.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 24, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER REGARDING PRINTING OF EXHIBITS

It Is Hereby Stipulated by and between counsel for the respective parties hereto that the following exhibits, a part of the record on appeal herein, designated by appellants for printing need not be printed but may be examined in the original in connection with said appeal with the same force and effect as though said exhibits had been printed, to wit:

1. Plaintiffs' exhibits 1 through 84A, both inclusive, comprising all of the exhibits offered by plaintiff at the trial of the cause and there marked for identification or received in evidence.

2. Defendants' exhibits A through FJ, both inclusive, comprising all of the exhibits offered by defendants at the trial of the cause and there marked for identification or received in evidence.

Dated September 17, 1956.

ROSS C. FISHER,
HERMAN F. SELVIN,
THOMAS C. STRACHAN, JR.,
FRANK F. FOWLE,
MELVILLE C. WILLIAMS,

By /s/ ROSS C. FISHER,
Attorneys for Appellants Sunkist Growers, Inc., and The Exchange Orange Products Company.

/s/ WILLIAM C. DIXON,
Attorney for Appellees.

[Endorsed]: Filed Sept. 24, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION FOR, AND SUPPLEMENTAL DESIGNATION OF RECORD TO BE PRINTED

A. It Is Hereby Stipulated that the Joint and Several Designation By Appellants of Record To Be Printed, heretofore served and filed herein, shall be supplemented and augmented in the particular respects hereinafter in section D of this stipulation specified.

B. It Is Further Stipulated that typographical errors appearing in appellants' original designation shall be corrected as hereinafter in section E of this stipulation specified.

C. It Is Further Stipulated hereby that if, by reason of delay in the mails or otherwise, this stipulation should not reach the Clerk for filing on or before September 26, 1956 (the last day now fixed within which appellants may make their designation), the matters herein specified shall be and be deemed to have been designated by appellees for

inclusion in the record to be printed pursuant to Rule 17(6) of the Rules of this Court.

D. The following portions of the record herein, in addition to those already designated, are hereby designated to be printed:

1. The following additional portion of the Notice of Motion by Defendant Exchange Lemon Products under Rule 37; being the document heretofore referred to in Item 9 of appellants' original designation, and appearing at pages 682-684 of the Clerk's Transcript:

Page 2, lines 11 to 17, inclusive.

2. The following portions only of Affidavit of Bernard Reich in Opposition to Motion under Rule 37; filed March 16, 1953, and appearing at pages 752 to 770 of the Clerk's Transcript:

Page 4, line 21, to page 6, line 12.

3. The following portions only of Reply Memorandum by Defendant Exchange Lemon Products Company under Rule 37; filed March 20, 1953, and appearing at pages 775 to 781 of the Clerk's Transcript:

Page 1, line 22, to page 4, line 16.

4. The following additional portions of Reporter's Transcript of Pretrial hearing of 11/24/54; being the transcript referred to in Item 13 of appellants' original designation:

Page 19, lines 7 to 13;

Page 22, line 24, to page 25, line 8.

5. The following additional portion of Reporter's Transcript of Proceedings of 2/14/55; being the transcript referred to in Item 18 of appellants' original designation:

Page 10, line 20, to page 12, line 20.

6. The following additional portion of Reporter's Transcript of Proceedings of 11/29/55; being the transcript referred to in Item 23 of appellants' original designation:

Page 2, line 24, to page 6, line 2.

7. The following additional portions of Reporter's Transcript of Proceedings of 12/7/55; being the transcript referred to in Item 24 of appellants' original designation:

Page 41, line 2, to page 44, line 4;
Page 44, line 24, to page 45, line 17;
Page 48, line 21, to page 53, line 21;
Page 58, lines 9 to 22;
Page 59, line 7, to page 60, line 1.

8. The following portions only of the Reporter's Transcript of Proceedings for 11/30/55:

Page 3, lines 6 to 11;
Page 11, lines 12 to 21.

9. The following additional portions of the Reporter's Transcript of the Trial; being the transcript referred to in Item 36 of appellants' original designation:

Page 266, lines 1 to 23;
Page 345, line 5, to page 346, line 24;
Page 1003, line 4, to page 1005, line 5;

Page 1078, line 21, to page 1081, line 7;
Page 1314, line 11, to page 1315, line 3;
Page 4347, line 5, to page 4349, line 1;
Page 4485, lines 3 to 4.

10. The following additional portion of Reporter's Transcript of 3/26/56; being the transcript referred to in Item 46 of appellants' original designation:

Page 38, line 13, to page 40, line 5.

11. The following portion only of Plaintiff and Intervener's Answers To Interrogatories Propounded By Defendant Exchange Lemon Products Co. (with objections to certain of the interrogatories); filed March 13, 1953, and appearing at pages 697 to 751 of the Clerk's Transcript:

Page 1, line 22, to page 2, line 17.

12. The following portion only of Interrogatories Propounded To Plaintiff and Intervenor by Sunkist Growers, Exchange Orange Products Co. and TreeSweet Products Co., filed June 16, 1952, and appearing at pages 457 to 485 of the Clerk's Transcript:

Page 2, lines 4 to 14.

13. This Stipulation.

E. Correct the following typographical errors in appellants' original designation:

1. In Item 36, at page 11, line 7, the reference to page 282, line 6, should read: Page 282, line 5.

2. In Item 36, at page 15, line 6, the reference to page 790, line 16, should read: page 794, line 16.

3. In Item 36, at page 17, line 14, the reference to page 1381, line 55, should read: page 1381, line 5.

4. In Item 46, at page 30, line 1, the reference to Page 47, line 24, should read: Page 47, line 23.

Dated: September 25, 1956.

ROSS C. FISHER,
HERMAN F. SELVIN,
THOMAS C. STRACHAN, JR.,
FRANK F. FOWLE,
MELVILLE C. WILLIAMS,

By ROSS C. FISHER,
Attorneys for Appellants.

WILLIAM C. DIXON,
HARRY M. IRWIN,

By WILLIAM C. DIXON,
Attorneys for Appellees.

[Endorsed]: Filed Sept. 26, 1956.

[fol. 3950]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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MINUTE ENTRY OF ARGUMENT AND SUBMISSION—November 4, 1959 (omitted in printing).

[fol. 3951]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Stephens, Barnes, and Merrill, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—September 30, 1961

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 3952]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15,242

SUNKIST GROWERS, INC., a Corporation, and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation, Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS Co., a Corporation, and RONALD WALKER, Trustee, Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

OPINION—September 30, 1960

Before: Stephens, Barnes and Merrill, Circuit Judges.

BARNES, Circuit Judge:

This is a private action for treble damages under the Sherman Act, 15 U.S.C. §§ 1-7, 15. Appellants are Sunkist Growers, Inc., a corporation (hereinafter referred to as Sunkist) and The Exchange Orange Products Company, a corporation (hereinafter referred to as Exchange Orange or EOP). Appellees are Winckler & Smith Citrus Products Co., a corporation and Ronald Walker, as trustee of Winckler & Smith (hereinafter referred to as Winckler or Trustee). The action was tried in the district court before a jury, which returned a verdict of $500,000. This was trebled to $1,500,000, and from that there was deducted the $2,500 originally paid in compromise by one-time defendant TreeSweet. There were added attorneys' fees fixed at $195,000, and costs. Timely appeal was filed in this Court. After argument, but before decision, one of the judges hearing this appeal died. It was thereupon set down for hearing a second time, was heard, and held pending the determination by the Supreme Court of *Milk Pro-*
[fol. 3953] *ducers Assn.* v. *U.S.*, 1960, 362 U.S. 458, having to do with the antitrust exemptions of agricultural marketing cooperatives.

I

PARTIES

Sunkist Growers, Inc., a corporation, was sued in the district court originally under its former name, California Fruit Growers Exchange. It is and has been a nonprofit agricultural cooperative marketing association. The second defendant, The Exchange Orange Products Company, a corporation, was sued in the court below as The Exchange Orange Products Company. At all times it was a wholly owned subsidiary of Sunkist. Together with Sunkist and Exchange Orange, there was originally named as a defendant Exchange Lemon Products Company, a corporation, sued originally as Exchange Lemon Products Company, a nonprofit corporation (hereinafter sometimes referred to as ELP or Exchange Lemon).

On motion of plaintiff, Exchange Lemon was dismissed with prejudice as a defendant, and was subsequently named

as a coconspirator in plaintiff's second amended complaint filed February 2, 1956, to conform to proof.

TreeSweet Products Company, a corporation (hereinafter referred to as TreeSweet) was an original defendant, but settled for $2,500, and was dismissed as a defendant. In the said second amended complaint, it was referred to as a coconspirator.

E. A. Silzle Corporation, a corporation (hereinafter referred to as Silzle) was never a defendant but was named a coconspirator in both plaintiffs' first and second amended complaints.

Appellee Ronald Walker is trustee of the estate of Winckler & Smith Products Co. in those proceedings in the district court below for its reorganization under Chapter X of the Bankruptcy Laws, being Number 538860-C of the records of said court. Mr. Walker was appointed March 26th, 1952 as such trustee, and by order made May 9, 1952 he was permitted to and did intervene in this case Mr. Walker is sometimes referred to herein as appellee, Walker, Trustee, or as Intervenor.

Thus on this appeal there are two appellants, Sunkist and EOP, and two appellees, the Winckler corporation and the Trustee.

[fol. 3954]

II

THE THEORY OF THE CASE

Appellees allege in their first cause of action (Section 1 of the Sherman Act; 15 U.S.C. § 1), and appellants deny, that appellants have conspired and entered into contracts which had the purpose and effect of unreasonably restraining interstate commerce in canned California citrus fruit juice, particularly single strength orange juice. This was proved, say appellees, by "six acts." These were:

(a) In the 1950-1951 canning season ELP processed 28,812 tons of oranges for EOP at cost, and without profit to ELP. Appellants *admit* this.

(b) During the same period, EOP processed 1,740 tons of lemons for ELP on the same basis. Appellants *admit* this.

(c) Sunkist and EOP agreed to establish and maintain the price of by-product oranges available to independent processors like appellees at a level making it impossible for processors like appellees to purchase oranges from EOP, or any other source, at a price or under any other arrangement enabling appellees and other processors to produce and sell canned natural orange juice and frozen concentrate juice at prices competitive with prices charged by appellants and their favored customers, TreeSweet and Silzle. Appellants *deny* these allegations.

(d) Under a contract effective July 23, 1951, between EOP and TreeSweet, TreeSweet received oranges from EOP, made single strength orange juice for EOP at cost and without profit to TreeSweet, and then bought the orange juice from EOP at Sunkist's then published price for single strength orange juice, less certain discounts not available to other customers, including appellees. The purpose and effect of this contract allegedly was to enable TreeSweet to obtain orange juice at a cost which prevented appellees from competing with Sunkist or TreeSweet in the natural orange juice market. Appellants *admit* the contract and supplying the oranges; *deny* the balance.

(e) Under a contract effective June 26, 1951, between EOP and Silzle, EOP furnished oranges to Silzle at $22.50 per ton, which was lower than the price to appellees or [fol. 3955] other processors. The purpose and effect allegedly was to give Silzle oranges at a price with which appellees could not compete. Appellants *admit* the contract and furnishing the oranges; *deny* the purpose or effect.

(f) EOP refused appellees a TreeSweet or Silzle type contract in 1951. Appellants *denied* the refusal, but *admitted* such a contract was not made.

Appellees allege that as a result of the above acts of appellants (listed in (a) to (f) above), and the monopoly control of Sunkist and Exchange Orange in 1951 over the amount and price of Valencia oranges available for processing, appellees were unable to process natural and frozen concentrate fruit juice in competition with Silzle, TreeSweet and Sunkist, which alleged facts eliminated appel-

lees as a competitor, and forced the filing of proceedings under Chapter X of the Bankruptcy Act. These allegations were added in the second amended complaint filed after the close of evidence. They were materially different from those in the original complaint. Appellants *deny* all these allegations.

Under the second cause of action (brought under § 2 of the Sherman Act, 15 U.S.C. § 2) it was charged that acts (a) to (f) above were done by appellants with monopoly control over citrus fruit markets in California and Arizona, and in so doing and in making such contracts, the parties named conspired to monopolize, and monopolized, single strength Valencia orange juice.

The second amended complaint additionally alleged contracts with independent processors Hyland-Stanford and Mission Dry, giving them first call on oranges and processing to the exclusion of Independent Fruit Growers' Association and Morgan Ward, its selling agent, and one of the appellees' principal suppliers of by-product oranges.

Appellants plead five separate defenses:

First: The second amended complaint, the amended complaint, and the original complaint each failed to state a claim upon which relief could be granted.

Second: The applicable statute of limitations, Section 338(1) of the Code of Civil Procedure of California, bars all causes of action asserted in the second amended complaint and in the amended complaint.

[fol. 3956] *Third*: All causes of action alleged in the second amended complaint and the amended complaint are barred by the laches of appellees, in that appellees are barred by laches and estopped from relying upon any acts involving Silzle, as the Silzle contract was disclosed to appellees on March 14, 1952, and appellees did not amend their complaint to include this contract until December 15, 1954, and such a long delay was prejudicial to appellants.

Fourth: Appellees are barred by laches and estopped from relying on the Hyland-Stanford and Mission Dry contracts first referred to in the second amended complaint, as these contracts were disclosed to appellees on November 9, 1955, and appellees did not amend their complaint to

refer to the Hyland-Stanford contract until January 31, 1956 (during the last few days of the trial) or to the Mission Dry contract until February 4, 1956 (after all the evidence was in), and such long delay was prejudicial to appellants.

Fifth: Appellees are barred by laches and estopped from alleging the new matters in the last paragraph of III(f) of the first cause of action (referred to in (f) above), because appellees knew of such matters through discovery long before trial and did not seek to amend its complaint to refer thereto until January 31, 1956, to appellants' surprise and prejudice, and such long delay was prejudicial to appellants.

This is a long record before us, and the matter is as complicated, both factually and legally, as is most antitrust litigation. We attempt to summarize the appellees' position by first stating what it was not. It was *not* appellees' position that appellants did not have certain exemptions from the antitrust laws under the Clayton and Capper-Volstead Acts, nor that they could not, as agriculturists, join together to make marketing agreements. It was appellees' position that such exemptions so granted were not absolute. Appellants could monopolize by-product oranges or single strength orange juice, either in the national market or in the California-Arizona area market, provided they achieved their monopoly position lawfully. Appellants could set any price they desired for their juice. They could make any "true" processing contracts with TreeSweet and Silzle, or with anyone else. They could refuse to make oranges available to appellees, if activated by "proper" business motives, as distinguished from "improper" motives.

[fol. 3957] Appellees insist, however, that appellants having monopolized by-product oranges from which single strength juice was made, and by such monopolization having control over the amount of by-product oranges available to independent contractors; having further set a price of $40.00 per ton for such oranges (a price alleged to have been one at which no independent processor could buy, process and compete with Sunkist in the single strength

juice market); having at the same time (*i.e.*, during the one year of 1951, here involved) made oranges available to TreeSweet and Silzle, competitors of appellees, under so-called "processing" contracts which were more than that because they permitted the competitors to secure oranges at a price substantially lower than $40.00 per ton; the appellants were thus guilty of a conspiracy or combination unauthorized by antitrust law, even as modified by the limited agricultural marketing exemptions.

Under this theory of the case, the court sought to leave with the jury several *questions of fact*, namely:

(1) Whether appellants had a legal monopoly of by-product oranges (and a resulting legal monopoly in single strength orange juice) in the California-Arizona market.

(2) Whether, if appellants did have such legal monopoly, it was used legally or illegally, in the particulars alleged.

(3) Whether such monopoly, if proved, gave appellants power and control over single strength orange fruit juice prices in the California-Arizona market.

(4) Whether such power and control, if proved, was used with the purpose or with the effect of eliminating a competitor in such market, *i.e.*, eliminating appellees.

(5) Whether such power and control, if proved, was sufficient to enable appellants to determine the price or the terms and conditions under which by-product oranges were available in 1951 to independent processors, including appellees.

(6) Whether appellants had conspired with non-defendant coconspirators to unlawfully use their market power and control to appellees' alleged consequent injury, or whether appellants had unlawfully used such monopoly power and control to appellees' injury.

[fol. 3958] (7) What damages were proximately caused by appellants' alleged actions.

With this explanation of our understanding of the theory of the case, we pass to:

III

QUESTIONS RAISED ON THIS APPEAL

There are four principal questions raised on this appeal: Was *any* violation of antitrust laws made out? Was there error in instructing or refusing to instruct the jury? Was there error in rulings on admission and rejection of evidence? Was there error in affixing attorneys' fees of $195,000? We shall discuss each in turn.

A. *Was any violation of antitrust laws made out?*

1. *The Exemption of Agricultural Cooperatives Generally*

There can be no conclusion as to the first error alleged until we determine the nature and extent of the exemption granted by law to agricultural cooperatives. This was raised by the pleadings and particularly, appellants' first and separate defense.

Sunkist was a nonprofit agricultural cooperative marketing association. So was EOP, a subsidiary of Sunkist. So was ELP, an association of growers who were likewise members of Sunkist.

The exemption claimed by appellants rests within § 6 of the Clayton Act and § 1 of the Capper-Volstead Act. Section 6 of the Clayton Act (38 Stat. 731 (1914), 15 U.S.C. § 17 (1958)) reads as follows:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects hereof; nor shall such organizations, or the members thereof, be held or construed to be [fol. 3959] illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Section 1 of the Capper-Volstead Act (42 Stat. 388 (1922), 7 U.S.C. § 291 (1958)) reads in material part as follows:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in association, corporate or otherwise . . . in collectively processing, preparing for market, handling and marketing in interstate . . . commerce such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . ."

The legislative history of the Clayton and Capper-Volstead Acts makes it clear that farmers (including orange growers) were granted the right to combine, contract and conspire together in restraint of trade in associations which, without the exemptions, would have violated the Sherman Act. Its purpose was to permit the farmers to compete with large corporations.[1] But by its terms, the exemption was not absolute—the individuals were permitted to associate in groups and the associations were permitted specifically to do but two things: "arrange marketing agencies in common," and contract and agree with their members participating, if necessary, to effect such purposes. As the most recent Supreme Court decision states:

> "Thus, the full effect of § 6 is that a group of farmers acting together as a single entity in an association

[1] "In the early 1900's, when agricultural cooperatives were growing in effectiveness, there was widespread concern because the mere organization of farmers for mutual help was often considered to be a violation of the antitrust laws. Some state courts had sustained antitrust charges against agricultural cooperatives, and as a result eventually all the States passed Acts authorizing their existence. It was to bar such prosecutions by the Federal Government as to interstate transactions that Congress in 1914 inserted § 6 in the Clayton Act exempting agricultural organizations, along with labor unions, from the antitrust laws." *Milk Producers Assn. v. U.S.*, *supra* at 464.

cannot be restrained 'from lawfully carrying out the [fol. 3960] *legitimate objects* thereof' (emphasis supplied), but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will." *Milk Producers Assn.* v. *U.S., supra,* at 465-6.

There have been few cases dealing with the Capper-Volstead Act exemptions.[2] At the time this case was tried in the district court, *United States* v. *Borden Co.*, 1939, 308 U.S. 188, was the leading case. It held that Capper-Volstead does not wholly exempt cooperatives, and particularly those conspiring with nonexempt legal entities. This same principle has been applied to labor unions, which have no absolute exemption from antitrust laws. *Allen Bradley Co.* v. *Union,* 1945, 325 U.S. 797, 805. The Clayton Act, § 6, applied only to nonstock agricultural cooperatives. Section 1 of the Capper-Volstead Act extended the same exemption to capital stock agricultural cooperatives.

> "[T]he general philosophy of both [acts] was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities." *Milk Producers Assn.* v. *U.S., supra,* at 466.

And in conclusion, Mr. Justice Black stated:

> "[T]he [Capper-Volstead] Act did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative." *Id.* at 467.

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[2] *Milk Producers Assn.* v. *U.S., supra; Tigner* v. *Texas,* 1940, 310 U.S. 141; *United States* v. *Borden Co.,* 1939, 308 U.S. 188; *United States* v. *Maryland & Virginia Milk Pro. Assn.,* D.C.Cir. 1949, 179 F.2d 426; *Hinton* v. *Columbia River Packers Ass'n.,* 9 Cir. 1942, 131 F.2d 88; *United States* v. *Maryland Cooperative Milk Pro.,* D.C. 1956, 145 F.Supp. 151; *Cape Cod Food Products* v. *National Cranberry Ass'n.,* D.Mass. 1954, 119 F.Supp. 900; *Manaka* v. *Monterey Sardine Industries,* N.D.Calif. 1941, 41 F.Supp. 531.

We conclude, therefore, that no blanket exemption is created by either Section 6 of the Clayton Act or Section 1 of the Capper-Volstead Act which permits an agricultural [fol. 3961] cooperative to either unlawfully monopolize, or attempt to monopolize, under Section 2 of the Sherman Act, nor to do any acts to restrain or suppress competition, or which result in the restraint or suppression of competition prohibited by Section 1 of the Sherman Act, if such acts, in either event, fall within the prohibitions of the respective Sherman Act sections. Thus the question as to whether there has been a violation of the antitrust laws is ordinarily one to properly go to the jury.

We next consider if there was proof of the violation of antitrust laws, despite the limited exemption the appellant Sunkist enjoys, sufficient to make out a question of fact for the jury. To pass upon this, we must consider certain of the facts of this case in detail in an attempt to establish and define the product and the pertinent market with which we are here concerned.

2. *The Product Involved*

As the case went to the jury, the defendants Sunkist and EOP were charged, as appellees' counsel put it on oral argument, with "a combination and conspiracy [under Sections 1 and 2 of the Sherman Act] to restrain trade in California citrus juices and to monopolize the production, processing and sale of those juices, primarily, insofar as appellee is concerned, single strength juices." The contracts charged to be in restraint of trade were allegedly made with the purpose of eliminating a competitor, the appellees.

In the first cause of action contained in appellees' amended complaint, the relevant market was designated as "canned citrus fruit juice, produced and processed in the State of California, and marketed throughout the United States." Thus originally all citrus fruit juice was involved; orange, lemon and grapefruit. By the amendment to the complaint to conform to evidence, the relevant market was restricted to "single strength Valencia [orange] juice."

In that respect it was alleged (again to conform to proof) that:

> "A total of approximately 5,400,000 gallons of single strength Valencia juice was processed in California in 1951. Of this amount, defendants EOP, TreeSweet and Silzle processed approximately 4,511,202 gallons, of which amount approximately 3,044,394 gallons were processed by TreeSweet and Silzle under the contracts and arrangement [complained of] .... Because of the [fol. 3962] monopoly control by Sunkist and EOP over the quantity and price at which Valencia product oranges were made available to independent processors of single strength juice other than TreeSweet and Silzle, and the aforesaid contracts, plaintiff was unable to and did not process any single strength Valencia juice in 1951."

3. *The Relevant Market*

The record discloses that entirely apart from the marketing of citrus fruit itself as the end product, an important consideration in the citrus industry is the utilization of by-products, such as oils from the peel, peel and pulp for cattle feed, and the juices themselves. Juices are divided in the trade into three categories: (1) The so-called "hot concentrate juice" (the syrup base for mixed citrus drinks); (2) the cold, or so-called "frozen concentrate," which is used to prepare the canned or frozen juice; and (3) the so-called "single strength," being the natural and untreated juice of the orange. Oranges for fruit juice purposes are valued and sold by the extent of their sugar content. Valencia oranges are apparently particularly valued for their high sugar content, and perhaps for their time of arrival on the market (although this advantage, of course, partially disappears when juices are kept from one season to the next).

Oranges are grown primarily in three states—California, Arizona and Florida. Oranges from both East and West Coasts compete in the national markets, both in fresh oranges and by-products. Due to the freight rates, California and Arizona oranges and juices are sold on a two-

price structure—cheaper in the East, where Florida is closer and the freight costs on Florida juice lower, and more expensive in the West, where transportation from Florida costs more. We conclude the relevant market area here involved was the California-Arizona area.

4. *Competition and Prices in the Product Involved in the Relevant Market*

During the year 1951, Sunkist controlled approximately seventy per cent of the total by-product Valencia orange market in the California-Arizona area, or 318,000 tons of by-product oranges.

[fol. 3963] The remaining thirty per cent of by-product Valencia oranges grown in California-Arizona came from scattered growers such as: (a) Independent Citrus Growers & Shippers Association, a grower cooperative (Morgan Ward, selling agent); (b) Mutual Orange Distributors of Anaheim, California, a grower cooperative; (c) American Fruit Growers Company, an independent grower, packer and shipper; (d) Paramount Citrus Association, a corporation organized by various growers for profit; (e) an unorganized group of individual growers, members of (a) above, who did not desire to market through Morgan Ward.

In 1951 in the California-Arizona area, there were three principal independent processors of by-product oranges: Winckler & Smith, TreeSweet and Silzle. These had no growers to supply them oranges, so they were required to buy their by-product oranges from the aforementioned five "independent" groups of growers, or from Sunkist or its subsidiary EOP, or (as to a very small amount of fruit) from even "more independent" growers than the five independents above mentioned. Mutual, American and Paramount, mentioned in (b), (c) and (d) above, had their own processing facilities, and by 1951 were processing all their own fruit, so had none to sell to independent processors.

"Independent Citrus Growers & Shippers Association" had no processing facilities of its own and no sales organization. It therefore sold to independent processors. Whether these independent processors would buy by-

product oranges to process into single strength juice depended, obviously, on the price they might be forced to pay for the oranges, and the price the might get for the canned or bottled single strength juice. If the processors could see no chance to make a profit, then the growers' representatives were forced to make processing contracts with hired processors in order to realize anything on their by-product oranges, and to prevent a loss.

There is no question but that Sunkist was the "leader" on pricing within the industry. In 1951 Sunkist admittedly set a price of $40.00 per ton on oranges containing 120 pounds of "soluble solids." (This is a term descriptive of what is left from an orange when water is extracted. It includes sugars, citric acid, and other solids. The average Valencia orange contains 120 pounds of soluble solids per ton of oranges.)

[fol. 3964] In 1951, "Independent Citrus Growers & Shippers Association" made a contract with Case-Swayne Co., Incorporated, an independent processor with no grower's supply, to process its by-product oranges into canned single strength juice, selling it under the Case-Swayne label, paying a net to Independent after deducting costs and a profit. Independent had twelve to fifteen per cent of the total supply of by-product oranges in the California-Arizona market, or at least 53,000 tons.

On August 6, 1951, Morgan Ward for Independent, signed a processing contract with Winckler by which Ward agreed to deliver sixty tons of by-product oranges per day up to three hundred and sixty tons per week during the two-months' canning season for the production of frozen concentrate, but this did not produce single strength juice for Winckler to sell. On August 17, 1951, he wrote to Morgan Ward (Exhibit AZ) in which he complained that he was not getting oranges for single strength juice. He charged monopoly against Morgan Ward, and requested the latter to put the matter up to the By-Products Committee of the Independent Citrus Growers & Shippers Association. This was done; the matter was left entirely to Morgan Ward's discretion. That company still refused to sell oranges to Winckler's for single strength processing. Mr. Ward's explanation is of interest. He said:

"Well, in 1951 I knew that we would be faced with a lot of fruit, there being no home for it outside of Winckler-Smith, Case-Swayne, Paramount and a few other small plants, a few small plants otherwise. I knew that we were going to have, in order to get money for the fruit for the growers, we were going to have to enter into participating contracts in processing this fruit, not with one, but several of these. So I wanted to be fair to Mr. Winckler, I wanted to be fair to Mr. Swayne and Paramount, for that matter, so I knew that Case-Swayne had no facilities except straight canned juice, so the first contract we entered into was with Case-Swayne for single-strength juice, orange juice.

"Q. That was early in the season?

"A. Early in the year. That was the first reason I gave him that part of it.

"The second reason was that if I gave single strength to Winckler and single strength to Case-Swayne, we [fol. 3965] would have our oranges out in the market competing in canned juice form, competing against each other.

"Then in order to be fair again with Winckler, I gave him the concentrate deal. Even though he wanted some single strength, I did not give it to him for that reason."

Winckler & Smith had been organized in 1946. The amounts of by-product oranges it had purchased primarily from Sunkist and thereafter from others up to and including 1950 had been as follows:

1946—$1,000,000 worth
1947—Substantially less
1948—$200,000 worth
1949— 3,500 tons from Sunkist
10,500 tons from Morgan Ward
4,300 tons from other sources
1950— 1,300 tons from Sunkist
11,500 tons from Morgan Ward
4,100 tons from other sources

During this same time, the tons of by-product oranges it had purchased from other sources, including Morgan Ward, had been increasing. Thus it is not entirely accurate to state, as appellees do, that "appellee [Winckler & Smith] had been a regular customer of Sunkist in the purchase of by-product oranges since its organization in 1946," up to 1951.

In 1951 Sunkist started out the year with plans for pooling and disposing of all its by-product oranges. The plan was to have EOP process the fruit, or to sell to other processors. A schedule of prices was established at which fruit was to be sold at a separate price per ton for each pound of soluble solids per ton, ranging from sixty to one hundred and fifty pounds.

The price set on by-product Valencia oranges for 1951 ranged from $17.00 per ton for fruit having sixty pounds of soluble solids to $51.50 per ton for fruit having one hundred and fifty pounds of soluble solids. Fruit having one hundred and twenty pounds of soluble solids was priced at $40.00 per ton, f.o.b. packing house. This price was set by Sam H. Kelly, general manager of Sunkist's Los Angeles District Office. The "independent Association" followed the "lead" of Sunkist as to price.

[fol. 3966] Sunkist sold 46,000 tons of by-product oranges at this price to independent processors in 1951. Apparently these oranges went into hot or frozen concentrate, as there was testimony such a price could be paid for such oranges so used in 1951 and produce a profit.

All other tonnage of Sunkist growers in 1951 was turned over to EOP for disposal. This was the largest by-product Valencia orange crop ever handled by EOP. It received 318,000 tons, processed 164,000 tons, and turned over 31,200 tons to ELP for processing at cost.

Exchange Orange thus had 122,800 additional tons of by-product oranges on hand. It sold 19,747 tons to General Foods; 14,842 tons to Hyland-Stanford; 6,773 tons to Mission Dry; and 3,730 tons to Hart's for processing, or a total of 45,092 tons, under "custom packing" contracts,[3]

[3] Under the true processing or "custom packing" contract, Exchange Orange furnished fruit to the independent processor for

into hot and frozen orange concentrate, but not for single strength juice. It contracted with TreeSweet to process 24,148 tons into single strength juice, and Silzle to process 6,675 tons into single strength juice. These were the contracts described as two of "six acts" which are the basis of appellees' complaint against Sunkist. Ten thousand six hundred and thirty tons were sold to Mission Dry and 817 tons to Hyland-Stanford under a "deferred payment plan."[4] This left 35,000 tons, approximately, which were [fol. 3967] unsuitable for processing into juice products.

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processing into specified products. The processed products were sold under the Sunkist label by the Products Department of Sunkist. The processor was paid its costs plus an assured profit on the processing operations. In 1951, Exchange Orange made such contracts for the processing of hot and frozen concentrate with Hyland-Stanford, Mission Dry, General Foods and Hart's.

[4] Under the so-called "fruit purchasing" contract, the independent processor agreed to buy all of its by-product fruit requirements from EOP at the going Sunkist price for such fruit at the time of delivery. The processed product was sold by the independent processor under its own label or under the labels of its buyers. The independent was not required to pay for the fruit until such time as it had sold the processed products. In the event the independent stopped buying fruit for its own account, either because of the price of fruit or because its capacity exceeded its own requirements for fruit, its production facilities were to be made available to EOP upon request. If EOP used such production facilities, the independent was paid its costs of operation plus a guaranteed profit. This provision of the fruit purchasing contract ties in to the true processing or "custom packing" contract which EOP sometimes had with the same independent processor.

Finley characterized the so-called "fruit purchasing" contracts with Hyland-Stanford and Mission Dry as providing for a "deferred payment" or a "credit plan," since the independent processor was not required to pay for the fruit it purchased from EOP until the products processed therefrom were sold by the independent, even though the processed products were, at all times, the property of the independent. Finley said that the provision in such contracts which required the purchaser to buy its full requirements of by-product oranges from EOP assured the independent of a dependable source of supply of fruit. He stated further that the deferred payment privilege afforded the independent under such contracts was given in exchange for the privilege given EOP for "first call" on the independent's processing facilities.

The years immediately before 1951 had seen a change in the use of by-product oranges. In 1950 EOP processed eleven per cent of all frozen orange juice in the California-Arizona market. In 1951 it processed fifty-eight per cent. There was an increasing market for frozen orange juice. Nevertheless, it was advisable and necessary to maintain the market in canned single strength juice.

There were four principal independent processors of canned single strength orange juice in the California-Arizona area, namely, TreeSweet, Silzle, Case-Swayne and appellee. TreeSweet sold in the national market under its own label. Silzle sold in the national market to private label buyers. Case-Swayne sold largely in the California market under its own label "Case-Swayne." Appellee sold in the national market under its "Anagold" label. These four canners were in competition with each other, and each of them competed with Sunkist, in the sale of canned single strength orange juice in interstate commerce.

5. *Contracts in the 1951 Season*

Under the 1951 contract between Exchange Orange and TreeSweet, Exchange Orange made by-product oranges available to TreeSweet on a consignment basis in such quantities as Exchange Orange determined. Exchange Orange agreed to pay TreeSweet its processing costs at [fol. 3968] specified rates and to pay the trucking costs of the fruit to TreeSweet's plant. TreeSweet agreed to purchase the resultant juice at the Sunkist published selling price as of the date of purchase, less discounts and allowances of fifteen per cent plus an advertising allowance of seven cents per case. TreeSweet was not required to pay for the juice until it was sold. The oil and peel were to be the property of Exchange Orange.

Under this contract TreeSweet processed 24,148 tons of by-product oranges into canned single strength orange juice, and sold it in the same interstate markets under the TreeSweet label in competition with similar juice sold by Sunkist and Silzle.

Finley (general manager of Exchange Orange) admitted that the Exchange Orange-TreeSweet contract guaranteed

TreeSweet against any inventory losses and protected it against any reductions in the market price for canned juice during both the selling and carry-over seasons. He admitted further that TreeSweet was guaranteed a profit under such contract. He stated that the TreeSweet contract provided, in effect, that Exchange Orange was to be paid for its by-product oranges on the basis of the difference between the amount credited to TreeSweet for processing such fruit and the price which TreeSweet paid Exchange Orange for the processed juice.

The amount credited to TreeSweet for processing the 24,148 tons was $859,004.00, and the amount payable by TreeSweet for the juice processed therefrom was $1,204,031.41. The difference between these two figures, to wit: $345,027.41, was the amount TreeSweet actually paid Exchange Orange for the 24,148 tons without the peel and oil by-products, or at the rate of almost $14.29 per ton.

Under this contract, EOP was to get the oil and peel or the proceeds therefrom. The net return from the oil and peel was $10.81 per ton. Therefore, the total amount EOP received for the by-product oranges processed under the TreeSweet contract was $25.10 per ton, namely, $14.29 actually paid by TreeSweet plus $10.81 for the oil and peel, or a price which was $19.12 less than the price for which the same quality of oranges were available for sale by Sunkist to other independent processors, including appellees.

[fol. 3960] Substantially the entire production of single strength orange juice under this contract was marketed under the TreeSweet label, and none of it was sold under the Sunkist label. TreeSweet received an advertising allowance of seven cents per case. The usual purpose of an advertising allowance was to advertise the brand name of the concern granting such allowance, but in this case TreeSweet was permitted to make any use it saw fit of this advertising allowance.

The contract with TreeSweet was justified on the ground that TreeSweet had the facilities to process the juice and the sales organization to move the merchandise, and on the ground that it was important that some California

single strength juice be on the market in 1951. Sunkist had never mentioned to any independent processor until 1951 that this kind of arrangement was being made available to TreeSweet during the years 1947 to 1950, inclusive.

Silzle was engaged primarily in the business of processing and selling canned single strength orange juice. It sold such juice primarily to private label buyers who sold to the same class of customers and in direct competition with canned single strength juice sold by Sunkist, TreeSweet and appellees. Silzle had secured through the Bauer Fruit Company, a partnership composed of certain stockholders of Silzle, its fruit requirements.

Early in 1951, Kelly of Sunkist called Finley of EOP to secure the latter's approval to sell seventy-two tons of by-product oranges to Silzle at $27.00 per ton, including the oil and peel, in order to permit Silzle to meet a competitive situation then existing with Case-Swayne. Finley approved the sale. These oranges ranged from one hundred twenty-three to one hundred thirty-six pounds of soluble solids per ton which, under the Sunkist published selling price, were priced from $41.15 to $46.13 per ton. A little later, under an oral arrangement, Finley let Silzle have five hundred and twenty-seven tons at $22.50 per ton, with Silzle keeping the oil and peel.

About the middle of June 1951, Finley contacted Thelma Silzle, president of Silzle, and offered her a contract similar to the TreeSweet contract, "and she was willing and wanted a contract." The parties operated on an oral basis for most of the season. The written contract was not signed until September 10, 1951, but by its terms it was to be [fol. 3970] effective from July 15, 1951 until the end of the season.

Under this contract Silzle processed 6,675 tons of by-product oranges into canned single strength orange juice, in addition to the seventy-two tons and five hundred and twenty-seven tons purchased earlier. Silzle purchased the canned juice from EOP at the published Sunkist selling price at the time of purchase, less a discount of twelve and one-half per cent, plus an advertising allowance of seven cents per case. Silzle was credited with $215,602.10

for processing, and it paid EOP the difference between $215,602.10 and $306,263.65, Sunkist's selling price for the resultant juice. Silzle thus paid $90,661.55 for the 6,675 tons of oranges exclusive of oil and peel, or at the rate of $13.58 per ton for by-product oranges. The average soluble solids content of the oranges processed by Silzle under the 1951 contract was one hundred and twenty pounds of soluble solids per ton. The Sunkist published selling price in 1951 for by-product oranges containing one hundred and twenty pounds of soluble solids per ton was $40.00 per ton. Silzle thus acquired oranges from EOP, exclusive of the peel and oil content, at a price which was $26.42 per ton less than Sunkist's published selling price for oranges of the same quality.

Under this contract EOP was to get the value of the oil and peel, which amounted to $4.08 per ton. Thus, the total amount EOP received for the by-product oranges processed under the Silzle contract was $17.66 per ton, namely, $13.58 per ton paid by Silzle, plus $4.08 per ton received for the oil and peel; or a price which was $22.34 per ton less than the price for which the same quality of oranges was available for sale by Sunkist to other independent processors, including appellees. Unlike TreeSweet, Silzle was to pack juice only for current sales, not for inventory.

The terms of the various contracts are definite. The contracts themselves are in evidence, and their execution is admitted by the pleadings.

The question permitted to go to the jury for determination was why Sunkist, in 1951, sold to one processor of "single strength Valencia orange juice" at one price, and failed to sell to another at any price. If there *was* a refusal, was it a valid exercise of business judgment? If so, it was lawful. If it was a contract made to restrain com- [fol. 3971] petition or to fix prices, or, from a position of legal monopoly, was used illegally to monopolize or to attempt to monopolize, then appellees were entitled to recover damages proximately resulting from appellants' illegal acts. Such questions obviously would ordinarily be questions of fact.

6. *The Alleged Refusal to Sell*

We have observed above, with respect to the "sixth act" of the "six acts" mentioned hereinbefore (II(f), *supra*), that Sunkist denied any refusal to sell to appellees, but admitted no contract had been made with them.

The right to offer to sell or buy with perfect freedom, and to refuse to sell or buy with the same freedom, is supposedly a fundamental right sought to be protected by our competitive free enterprise system, and by the antitrust laws.

Its legality has been primarily established by what has been described as one of the ten leading cases in antitrust enforcement during its seventy year history: *United States* v. *Colgate*, 1919, 250 U.S. 300. Speaking for a unanimous Court, Mr. Justice McReynolds there referred to the long recognized right of a manufacturer to exercise his independent discretion as to parties with whom he would deal.[5] But like so many generalizations, the "right" to exercise independent discretion cannot be taken as an absolute.[6]

[fol. 3972] Mr. Justice Burton so stated in *Lorain Journal* v. *United States*, 1951, 342 U.S. 143, 155.[7] As Mr. Justice Holmes said: "But the word 'right' is one of the most de-

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[5] "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." 250 U.S. 300, at 307.

[6] We discuss the problem without considering the immunities defendant allegedly acquired under both the Capper-Volstead and Clayton Acts. We also note that the general statement in *Colgate* has reference to a right as it exists under the Sherman Act. More than that was originally plead in this case, but the Robinson-Patman Act violations were dismissed and were not before the jury.

[7] *Cf.* Rifkind, Division of Territories, in Van Cise and Dunn, How to Comply With the Antitrust Laws, 127, 136 (1954).

ceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion." [8]

We speak here only of decisions arrived at unilaterally, *i.e.*, the decisions of the single trader. Any notion that such a right to select customers by joint action exists has been laid to rest.[9] *Klor's* has reduced this prospect to a mirage.[10]

Confining our attention, then, to the decision made by a single trader, irrespective of any statutory immunities, we ask whether the seller may select with whom he may deal. Whether we label it a right or a privilege, both common law[11] and statute[12] have consistently adhered to the general theory expressed in *Colgate*. Late Supreme Court cases confirm its existence,[13] but with certain definite limitations.

Text writers tell us this general "right" of choice of dealing may be violative of antitrust laws when it is "misused or abused," *i.e.*, "when there is proof of any one of a number of plus elements of liability that may taint the otherwise lawful individual refusal to sell." [14] "These plus elements," says Professor Oppenheim of Michigan,

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[8] *Amer. Bank & Trust Co.* v. *Federal Bank*, 1921, 256 U.S. 350, 358.

[9] *Klor's* v. *Broadway-Hale Stores*, 1959, 359 U.S. 207.

[10] Oppenheim, Selected Antitrust Developments, 15 A.B.A. Section of Antitrust Law 37, 54 (1959).

[11] 4 Restatement, Torts § 762.

[12] 15 U.S.C. § 13(a) (1958).

"Section 2(a) of the Robinson-Patman Act, 15 U.S.C. Section 13(a), contains a proviso 'That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.' In *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55 at 64 (1959), the Court stated that this proviso codifies the rule of *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919) . . ." Oppenheim, *op. cit. supra* note 10, at 43.

[13] Handler, Recent Antitrust Developments, 14 Record of the Bar Association of the Bar of the City of New York 318 (1959).

[14] Oppenheim, *op. cit. supra* note 10, at 43.

[fol. 3973] "include, among others, the following major species of illegality: (1) tortious conduct constituting unfair competition or unfair trade practice at common law; (2) violation of a civil rights statute or other type of constitutionally valid statute limiting refusals to deal; and (3) conduct otherwise in violation of the Sherman Act, Clayton, Section 5 of the Federal Trade Commission Act or any applicable state antitrust statute." [15]

But the decisions in past years,[16] as well as recent dicta by the Supreme Court,[17] warrant the generalization made

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[15] Oppenheim, *op. cit. supra* note 10, at 43-4.

[16] Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847 (1955); Saulnier, Achieving Price Stability as a Basis for Economic Growth in a Free Society, 15 Bus. Law 83 (1959).

United States v. *Parke, Davis & Co.*, 1950, 362 U.S. 29, emphasized the narrowness of the path of legality a seller must follow in utilizing the doctrine of *United States* v. *Colgate* in suggesting resale prices to customers. Relying on *U. S.* v. *Bausch & Lomb Co.*, 1944, 321 U.S. 707, *Federal Trade Comm.* v. *Beech-Nut Co.*, 1922, 257 U.S. 441, and *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 1911, 220 U.S. 373, the Court ruled there were two types of action prohibited by *Colgate:* (1) agreements or contractual arrangements on a vertical plane, and (2) a concerted plan of action on a horizontal plane.

> "In other words, an unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." *United States* v. *Parke, Davis & Co.*, *supra* at 43.

The unilateral right to set prices, without "other means" of implementation, leaving the person affected the right to accept or reject the fixed price, is maintained from *Colgate*, and approved. *Cf.* also *George W. Warner & Co.* v. *Black & Decker Mfg. Co.*, 2 Cir. 1960, 277 F.2d 787.

[17] Justice Black in *Klor's* specifically said: "This is not the case of a single trader refusing to deal with another. . . . ." (citing *United States* v. *Colgate, supra; United States* v. *Schrader's Son, Inc.*, 1920, 252 U.S. 85; *U.S.* v. *Bausch & Lomb Co., supra; Lorain Journal* v. *United States, supra*). *Klor's* v. *Broadway-Hale Stores, supra* at 312.

by a writer with which this Court agrees: "[*An*] *individ-* [fol. 3974] *ual refusal to deal is preserved wherever it is reasonably ancillary to the effectuation of lawful marketing objectives.*" [18] (Emphasis added.)

Entirely apart from a unilateral refusal to sell or deal, we have, charged herein as a conspiracy, the joint or concerted refusal. "Concerted refusals by traders to deal with other traders" are equated to "group boycotts" by the most recent Supreme Court decision on the subject.[19] They "have long been held to be in the forbidden category." [20] The Court goes on:

> "They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.' *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U.S. 457, 466, 467-468. Cf. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 213, 'such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' Cf. *United*

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[18] Oppenheim, *op. cit. supra* note 10, at 44. See *Associated Press* v. *United States*, 1945, 326 U.S. 1. Professor Oppenheim goes further: "Indeed, the cases support an even broader generalization. In the absence of one of the plus illegal elements previously summarized, a seller acting alone is not required by law to justify his refusal to deal. His motive is immaterial unless it is relevant to one of the plus elements mentioned." *Cf. Times-Picayune* v. *United States*, 1953, 345 U.S. 594, 625; Timberg, Selection of Customers, in Van Cise and Dunn, How to Comply With the Antitrust Laws, 117, 119 (1954), citing *Fed. Trade Comm.* v. *Raymond Co.*, 1924, 263 U.S. 565.

Also *cf.* Oppenheim, Developments in Antitrust Law During the Past Year, pp. 29-33, American Bar Association Section of Antitrust Law (1960).

[19] *Klor's* v. *Broadway-Hale Stores*, *supra* at 212.

[20] *Klor's* v. *Broadway-Hale Stores*, *supra* at 212.

States v. *Patten*, 226 U.S. 525, 542." *Klor's* v. *Broadway-Hale Stores*, 1959, 359 U.S. 207 at 212.

Thus, in this case, we conclude the question as to whether there had been a concerted refusal to sell, as alleged by [fol. 3975] appellees, or an illegal unilateral refusal to sell, were questions of fact for the jury's determination. The jury's verdict could have been based on either (1) the alleged illegal conspiracy and agreement to make contracts constituting a restraint of trade, or " . . . (2) the alleged illegal sole trader decision not to sell, made *when such refusal would, as a natural consequence,* illegally restrain trade or commerce, and implemented by other illegal means beyond the bare refusal, or (3) a similar unilateral decision not to sell, except at a fixed price, made from a monopoly position, *and resulting, as a natural consequence, in the elimination of a competitor.*" We cannot know which one or more of the theories stated were adopted by the jury in determining liability. With this in mind, we must consider the evidence and the instructions given on this phase of the case. If there exists in the record sufficient evidence to justify the action going to the jury on all three of these theories, and there were no errors in the instructions nor in the introduction of evidence, then we are bound by the jury's verdict on questions of fact.

We conclude that this was the theory under which the trial court permitted the case to go to the jury, as disclosed by the instructions themselves and the trial court's and counsel's comments, and discussion of them, at the trial. We further conclude such submission to the jury was, in theory, correct.

B. *Was there error in instructing or refusing to instruct the jury?*

This was not an easy case in which to instruct the jury, and the instructions were necessarily many and involved.

In the instructions, the jury was first advised that a parent corporation and its wholly owned subsidiary (Sunkist and EOP, respectively) "can be guilty of combining or conspiring together to violate the antitrust laws," *i.e.*, on the theory of an intracorporate conspiracy (*e.g.*, *Kiefer*

Stewart Co. v. *Seagram & Sons*, 1951, 340 U.S. 211); that acts lawful in themselves can become unlawful "when part of an illegal scheme or plan, or when used to accomplish an illegal purpose" (*e.g.*, *Direct Sales Co.* v. *U.S.*, 1943, 319 U.S. 671); that the acts charged against appellants under the first or restraint of trade cause of action need not have been shown to have been done with specific intent of elimination of competition in the juice market, if those [fol. 3976] acts "actually and necessarily resulted in the elimination of such competition," since everyone is presumed to intend the natural and probable results or consequences of his conduct. *People* v. *Renozo*, 1952, 109 Cal. App.2d 793, 241 P.2d 628; *King* v. *Commonwealth*, 1941, 285 Ky. 654, 148 S.W.2d 1044.

The court then referred to the "six acts" complained of which were claimed to be the proximate cause of appellees' damage (see II(a) to (f), *supra*), and added:

> "The other contracts entered into evidence between Exchange Orange and Hyland Stanford, Harts, Case-Swayne, Mission Dry and General Foods, also referred to as Bireley's, were offered and received for the general purpose of showing the operations of Exchange Orange and such bearing as they may have in general, but are not claimed or alleged by the plaintiffs, to be any cause of their claimed damage."

The court explained the defendants' defenses.[21]

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[21] "It is defendants' position, first of all, that they did not have a monopoly of products oranges or a monopoly of the business of processing the oranges and selling the juice in interstate commerce. Defendants contend that such monopolies could have been lawful, if they had existed, because of the statutes relating to marketing associations, but they deny that there were such monopolies.

"With respect to lemons, it is defendants' position that whether Exchange Lemon had a monopoly of products lemons or of the business of processing and selling lemon juice, is immaterial in this case, since, defendants claim, the plaintiff was not in the lemon juice business except in a very minor way.

"In any event, defendants deny that they misused any power that they may have had with respect to products oranges or lemons.

"Defendants also deny that they violated the antitrust laws in any way. They deny they combined or conspired with Exchange

[fol. 3977] The court then instructed on monopoly power:

"The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage or to destroy a competitor is unlawful.

"The defendant Sunkist is permitted under the law to acquire a legal monopoly over product Valencia oranges that are available for processing into citrus juice products, including single-strength Valencia juice. Sunkist or Exchange Orange could in 1951 have legally processed all of such oranges in their own plants into citrus juice products and not made any of them available to independent processors, such as the

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Lemon, TreeSweet and Silzle, or any of them, to restrain trade and commerce in single-strength Valencia orange juice or and (sic) other citrus fruit juice processed in California and sold in interstate commerce, or that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to suppress or eliminate the competition of the plaintiff.

"Defendants also deny that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to monopolize the market for single-strength Valencia orange juice or any other citrus fruit juice processed in California and sold in interstate commerce, or that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to exclude the competition of the plaintiff from such market.

"The defendants also deny that they and Exchange Lemon and TreeSweet and Silzle, or any of them, actually monopolized the market for single-strength Valencia orange juice or any other citrus fruit juice processed in California and sold in interstate commerce.

"With respect to the six acts complained of as causing plaintiff's damage, defendants contend that such acts were lawful and that they were not performed pursuant to any combination or conspiracy or for the purpose of restraining or monopolizing trade and commerce or for the purpose of injuring the plaintiff.

"It is also defendants' contention that they were under no legal obligation to do business with the plaintiff, and that even if defendants had had some obligation to do business with independent processors generally, there was ample justification for not doing business with the plaintiff.

"Defendants contend, finally, that what happened to the plaintiff in 1951 was caused, not by any act of the defendants, but by the general economic conditions in the citrus fruit industry and by plaintiff's lack of capital and the mismanagement of its business."

plaintiff, TreeSweet or Silzle, if they had been able to, and cared to do so. Defendant Exchange Orange, as the processing company for the grower members of Sunkist, could also enter into lawful processing contracts with independent processors to have the oranges of the grower members of Sunkist processed into citrus juices to be thereafter sold by Sunkist as the citrus juice products of its grower members to prospective buyers thereof, including independent processors. However, such contracts must be lawful processing contracts and not devices which are resorted to [fol. 3978] pursuant to the conspiracy charged to illegally restrain trade, or to illegally monopolize that part of the citrus juice market which is represented by such citrus juices as are processed in California and thereafter sold in interstate commerce. It is for you to decide whether the contracts which Exchange Orange entered into in 1951 with TreeSweet and Silzle, when coupled with any refusal of the defendant Sunkist or Exchange Orange, to make oranges available to the plaintiff under comparable arrangements pursuant to the combination or conspiracy charged, were lawful processing contracts, or whether they were contracts which were made pursuant to the combination or conspiracy charged and had the purpose and effect of restraining and/or monopolizing interstate trade and commerce in the citrus juices and particularly single-strength Valencia orange juice processed in California and sold in interstate commerce, by eliminating competition between Sunkist and such processors in the interstate market for such products as were processed under such contracts."

And the court reinstructed on the same subject.[22]

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[22] "Now, so that you will not be confused, let's back up. Here are co-operatives which are permitted to combine together to produce and market their fruit. The antitrust laws say that they may lawfully do that, and the antitrust laws say that they shall not be in violation of any—are you sleepy down there?

"Juror Daiker: No.

(footnote continued)

[fol. 3979] The court next instructed on the power to determine prices, or to exclude a competitor, and the law-
[fol. 3980] ful as well as the unlawful exercise of that power,

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"The Court (Continuing): —shall not be in violation of any antitrust law in so doing.

"The plaintiffs claim that the defendants did actually have a monopoly of product fruit through their co-operatives. The defendants say, 'We didn't have it. But, if we did, it was legal.' And the court has told you that it was legal. So there is no dispute about that.

"As the court has told you, the defendants Sunkist, Orange, and co-conspirator Lemon, could have had 100 per cent monopoly of all oranges and lemons grown in Southern California, so that isn't our problem. It is what you find happened or did not happen from there on out.

"If they had this monopoly control of products oranges, then they could not use it illegally. They could use it legally. Likewise, the plaintiff contends that the defendants conspired and combined to restrain trade and commerce, and conspired and combined to monopolize the citrus fruit market, which is something different from the product fruit.

"The question that is being left to you as jurors is not the question as to whether these co-operatives could have legally had a monopoly of all the oranges or lemons in California; there is no argument about that; the question on that phase of the case is whether or not, if plaintiff proves they did have such monopoly, did they use it legally or illegally. That is a question of fact. You are the sole judges of the facts.

"Sections 1 and 2 of the Sherman Act have both the geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of the things forming a part of interstate commerce. If you find that either or both of the defendants combined with TreeSweet or Silzle to eliminate the competition of the plaintiff in the market for citrus fruit juices, particularly single-strength Valencia juice processed in California and sold in interstate commerce, and that any of the acts charged to have been performed by such defendants were performed in furtherance of such combination or conspiracy, and that the performance of any such acts was the proximate cause of any damage to the plaintiff, you should find that there was a violation of the antitrust laws and proximate causation, and you should proceed to the question of damage.

"Any combination effectively excluding outsiders from the business altogether is a monopoly and is unconditionally unlawful.

and referred specifically to the processing contracts with TreeSweet and Silzle.[22]

After advising the jury that direct evidence of a refusal to deal with Winckler on terms comparable to those offered to TreeSweet and Silzle was not necessary, and that EOP had a legal right to refuse to contract with Winckler unless such refusal was some part of a violation of antitrust laws, the court gave two instructions which he characterized as summing up "what is charged and what the plaintiff must prove." It is these instructions, originally requested by defendants but modified by the court, which appellants vigorously attack as error. They read:

"No claim or contention is made herein by the plaintiff that defendants, or either of them, attempted to monopolize.

"This may be a technical distinction. There is a charge that they conspired to monopolize. That is different from an attempt to monopolize, to go back to those instructions that I gave you on conspiracy. Attempt to monopolize is something different. For instance, one individual could attempt to monopolize, without any conspiracy. But there is no charge of attempt to monopolize.

"In considering the matter of monopoly power two ingredients are of outstanding significance: the power to fix prices and the power to exclude competition.

"The words 'to fix prices,' refer to price fixing activities which tamper with or affect price structures in interstate trade or commerce.

"Whether monopoly power existed in a defendant or defendants, and whether such power was illegally used or misused, is a question of fact for the jury."

[22] "I charge you that the defendant Exchange Orange may legally enter into a processing contract whereby Valencia oranges furnished by Sunkist or Exchange Orange may be processed into single-strength orange juice for Sunkist by an independent processor party to such contract. However, such processing contracts cannot be entered into by Exchange Orange as part of a combination or conspiracy which has the purpose or effect of fixing the prices at which single-strength Valencia juice processed by TreeSweet and Silzle for Exchange Orange may be sold or offered for sale by TreeSweet or Silzle in interstate commerce as such contracts would then be illegal contracts.

"In other words, you have got a question of fact there. Were these legal processing contracts or were they illegal? I am trying to present both sides of the problem to you."

"(a) Defendants' No. 7

"The first cause of action charges that the defendants Sunkist and Exchange Orange and the alleged co-conspirators, Exchange Lemon, TreeSweet and Silzle, combined and conspired with each other at a date unknown to the plaintiff, and entered into contracts and did certain other things in 1951 with the purpose and effect of unreasonably restraining interstate trade and commerce in canned citrus fruit juices, particularly single-strength Valencia orange juice produced in California and marketed throughout the United States, with the resultant injury and damage to the plaintiff, i.e., that Sunkist and Exchange Orange and the alleged co-conspirators combined and conspired to eliminate the competition of the plaintiff in the interstate market for canned citrus fruit juices and particularly [fol. 3981] single-strength Valencia orange juice in the year 1951, and performed certain acts pursuant to such combination and conspiracy which proximately caused damage to plaintiff.

"Unless you find, therefore, from the preponderance of the evidence, that Sunkist or Exchange Orange or either of them, combined or conspired with either TreeSweet, or Silzle, or ELP, and in 1951 did one or more of the specific acts charged—those are the six acts, one or more of the six acts—charged in the first cause of action, and that such act or acts had the purpose or necessary effect of damaging or eliminating the competition of plaintiffs in the interstate market for California canned citrus fruit juices or single-strength Valencia orange juice, your verdict must be for the defendants on the first cause of action.

* * * * *

"(b) Defendants' No. 17A

"The second cause of action charges that the defendants Sunkist and Exchange Orange and the alleged co-conspirators Exchange Lemon, TreeSweet and Silzle combined and conspired together, and performed the same six acts alleged in the first cause of action, which

> are incorporated by reference into the second cause, in order to monopolize the production and interstate sale of California citrus fruit juices, especially single-strength Valencia orange juice, and that pursuant to such conspiracy they actually monopolized such production and interstate sale of California citrus fruit juices, and particularly single-strength Valencia orange juice, with resultant injury and damage to plaintiff. Unless you find from the preponderance of the evidence that defendants Sunkist and Exchange Orange, or either of them, and one or more of the alleged co-conspirators, combined and conspired, and pursuant to such combination or conspiracy did one or more of the acts charged, and complained of, in order to acquire effective control of the interstate market for California citrus fruit juices, with the purpose or necessary effect of eliminating competition, including that of the plaintiff, from such market, your verdict must be for the defendants on the second cause of action."

[fol. 3982] Under that charge appellants urge the jury could have found that the conspiracy consisted of only Sunkist or EOP and ELP. Such a conspiracy, say appellants, involved only exempt cooperatives; that these instructions removed any exemption created by Capper-Volstead from the case entirely.

This error, say appellants, was compounded by the trial court in its attempt to clarify the charge after it had been given. In this regard the court said:

> "I also am told that I spoke about how the defendants had conspired on one occasion. The charge is not that the defendants conspired. The charge is that the defendants and co-conspirators conspired.
>
> "However, as a matter of fact, you may find that nobody conspired, or you may pick out and decide that some number less than the total conspired. It is your task to decide the facts."

Appellants' argument first presupposes that agricultural cooperatives can combine to fix prices or eliminate competitors with immunity, otherwise Capper-Volstead means nothing. With this position we do not agree.

First: We do not now understand (since the *Milk Producers* decision) that different agricultural cooperatives, combining together, are entitled to claim a total immunity for acts which they may lawfully do unilaterally, any more than individuals may claim for certain of their joint actions the same immunity under antitrust laws which would exist as to their several independent acts.

> "[A] group of farmers acting together *as a simple entity* in an association cannot be restrained 'from lawfully carrying out *the legitimate objects* thereof,' but the section [Section 6 of the Clayton Act] cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will." (Emphasis added.) *Milk Producers Assn.* v. *U.S., supra,* at 465-6.

> "The Capper-Volstead Act . . . extended § 6 of the Clayton Act exemption . . . [but] did not leave cooperatives free to engage in practices against other persons in [fol. 3983] order to monopolize trade, or restrain or suppress competition with the cooperative." *Id.* at 466-7.

Second: We point out that the error as allegedly compounded by the loose language ("You may find that nobody conspired, or . . . *that some number less than the total conspired.*" (Emphasis added.)) was followed by a grudging approval of such instruction to the jury by both sides, just before the jury retired:

> "[The Court:] . . . . Now, do you want to come back up again, or are you content? Is that satisfactory?
> "Mr. Fisher: I think we are content.
> "The Court: Satisfactory, Mr. Dixon?
> "Mr. Dixon: Satisfactory."

Third: We think there exists support in the law for such instructions. *United States* v. *Timken Roller Bearing Co.,* N.D. Ohio, 1949, 83 F.Supp.2d 84, *affirmed* 341 U.S. 593 (1951). "[C]ommon ownership and control does not liberate corporations from the impact of the antitrust laws." *Kiefer-Stewart Co.* v. *Seagram & Sons, supra* at 215. *But*

cf: Report of the Attorney General's National Committee to Study the Antitrust Laws, pp. 30-36 (1955).

The entire instructions given cover fifty pages of the transcript. The first ten pages and the last five were "stock instructions," applicable in any private conspiracy antitrust case where plaintiffs seek damages. Ten pages of instructions cover the pleadings, the statutes involved, the appellants' denials and defenses, and an explanation of certain evidence received, to which no objection is made by appellants.

Appellants do however, in thirty-nine specifications object to almost every one of the remaining instructions, given at the request of appellees or on the court's own motion; and to four instructions which were requested by appellants but modified by the court. Additionally, twenty-seven instructions proposed by appellants and rejected by the court, are alleged as error. Thus, there are sixty-six alleged errors in the giving or refusing of instructions. We find it unnecessary to go into each instruction individually. Some are based on the theory of exemption which *Milk Producers* [fol. 3984] *Assn.* v. *U.S., supra,* laid at rest,[24] or the "public injury" concept, buried by *Klor's* v. *Broadway-Hale Stores, supra.*[25] Some have to do with definition of the relevant market hereinbefore discussed.[26] Some have to do with intra-corporate conspiracy.[27] Others were allegedly vague, ambiguous, or confusing,[28] or tended to "over-emphasize," [29] or be unnecessary or needless repetition,[30] or were immaterial,[31] or focused attention unnecessarily.[32] All the fore-

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[24] For example, alleged errors 2(a), 2(f), 2(g), 2(i), 2(k), 2(s), 2(z) and 2(dd).

[25] For example, alleged errors 2(z) (2d para); 3(a).

[26] For example, alleged errors 2(d) and 2(s).

[27] For example, alleged errors 2(b), 2(n) and 2(o).

[28] For example, alleged errors 2(d), 2(e), 2(h) and 2(i).

[29] For example, alleged errors 2(l), 2(m) and 2(u).

[30] For example, alleged errors 2(g) and 2(h).

[31] For example, alleged errors 2(k), 2(l), 2(m) and 2(p).

[32] For example, alleged errors 2(j).

going objections not hereinafter touched upon we hold invalid, or of such slight consequence that they do not constitute substantial error, and are not prejudicial. Fed. R. Civ. P. 61.

Appellees, of course, urge that the instructions must be "viewed in their entirety, rather than in isolated segments"; that "even if a single instruction is erroneous, it does not call for reversal if it is cured by a subsequent charge or by a consideration of the entire charge," citing *Jesonis* v. *Oliver J. Olson and Co.*, 9 Cir. 1956, 238 F.2d 307, 309. We agree with that general principle, yet if a substantial and prejudicial error is made in the giving of but one instruction, the verdict cannot stand. We therefore consider in more detail certain other alleged errors which we feel merit discussion. We refer to the following:

(1) Was it error to instruct the jury as follows (alleged error 2(c)):

> "The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

The objection was because (a) it assumes monopoly power existed when its existence was a question of fact for the [fol. 3985] jury; (b) it is inapplicable to a conspiracy situation; (c) the only charge of misuse of monopoly power is by conspiracy; (d) it contains no reference to substantial restraint on interstate commerce; (e) it is silent on matter of intent.

This instruction is an exact quotation from *United States* v. *Griffith*, 1948, 334 U.S. 100, 107. It is difficult for this Court to see how a monopolist can make any business decision without its involving and using its monopoly power, nor how it can make any sale or purchase (for example) at an advantageous price, without gaining some competitive advantage. The statement is a broad one, but there were several other instructions given which modified and tempered its broadness, and which we must assume the jury understood and followed.

We find no merit to the objections urged, in view of the instructions taken as a whole and read together, as we are required to do on this appeal.

(2) Was it error to instruct the jury as follows (alleged error 2(r)):

> "Single strength orange juice . . . sold in interstate commerce may be the subject of restraint and monopoly under the Sherman Act."

The objection was because (a) this is a question of fact for the jury; (b) which was taken away from the jury.

The question of whether substantial interstate commerce exists is a question of fact for the jury. *Marks Food Corp.* v. *Barbara Ann Baking Co.*, No. 16095, decided December 28, 1959, as amended, 9 Cir., ... F.2d ..... *Cf. Beacon Theatre* v. *Westover*, 1959, 359 U.S. 500. But such question as to whether single strength orange juice was or was not a subject of restraint or monopoly was not, in our opinion taken away from the jury when the instructions are again read as a whole. Even considered singly, the instruction stated the jury *might*, not that it *must*, find that single strength orange juice was the subject of restraint and monopoly in interstate commerce. We hold there was no prejudicial error in this instruction.

(3) Was it error for the court to comment to the jury on the legal effect of Exhibits 84-A (plaintiff's re-organiza-
[fol. 3986] tion plan, alleged error 2(aa)) and particularly the last paragraph of said comment:

> "The loss of $169,000 or $170,000 resulting from the sale of the real estate and plant referred to in the evidence should not have been taken into account during Winckler & Smith's fiscal year ending January 31, 1950, and Mr. Lynch, the expert witness for the defendants, should not have so considered it, and the court was in error in permitting him to do so in his computations."

The objection was because (a) when the loss was to be taken was not a matter of law; (b) the comment discredited appellants' expert witness, Lynch.

In view of our position hereinafter taken as to damages, error or lack of it in this instruction is immaterial.

(4) Was it error to refuse appellants' six instructions, nine to fourteen, inclusive, instructing the jury the "six acts" complained of were not unlawful (alleged error 3(b))? [33]

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[33] "*No. 9*

"You are instructed that there was nothing unlawful in the agreement or arrangement entered into in 1951 between Exchange Orange and Exchange Lemon whereby Exchange Lemon processed oranges into single strength orange juice for Exchange Orange at cost and without profit to Exchange Lemon. Unless you find, therefore, from the preponderance of the evidence, that such agreement or arrangement was part of the conspiracy charged in the first causes of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such agreement or arrangement between Exchange Orange and Exchange Lemon as being of no consequence in this case, so far as the first cause of action is concerned.

"*No. 10*

"You are instructed that there was nothing unlawful in the agreement or arrangement entered into in 1951 between Exchange Lemon and Exchange Orange whereby Exchange Orange processed lemons for Exchange Lemon at cost and without profit to Exchange Orange. Unless you find, therefore, from the preponderance of the evidence, that such agreement or arrangement was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such agreement or arrangement between Exchange Lemon and Exchange Orange as being of no consequence in this case, so far as the first cause of action is concerned.

"*No. 11*

"You are instructed that there was nothing unlawful in Sunkist's setting its own price of by-product Valencia oranges available to independent processors at $40.00 per ton in 1951; and, unless you find, from the preponderance of the evidence, that the setting of such price was a part of the conspiracy charged in the first cause of action and was done for the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard Sunkist's setting of the $40.00 price as being

[fol. 3987] Each of these instructions referred to one of the six acts as being "nothing unlawful." They then went on to say that unless the acts were "part of a conspiracy"

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of no consequence in this case, so far as the first cause of action is concerned.

"No. 12

"You are instructed that there was nothing unlawful in the contract entered into between defendant Exchange Orange and alleged co-conspirator TreeSweet Products Company, effective as of July 23, 1951; and, unless you find, from the preponderance of the evidence, that such contract was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such contract between defendant Exchange Orange and alleged co-conspirator TreeSweet Products Company, as being of no consequence in this case, so far as the first cause of action is concerned.

"No. 13

"You are instructed that there was nothing unlawful in the contract between defendant Exchange Orange and alleged co-conspirator E. A. Silzle Corporation, effective June 26, 1951; and, unless you find, from the preponderance of the evidence, that this contract was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such contract between defendant Exchange Orange and alleged co-conspirator E. A. Silzle Corporation, as being of no consequence in this case, so far as the first cause of action is concerned.

"No. 14

"You are instructed that there was nothing unlawful in the refusal of defendant Exchange Orange to enter into a processing agreement with plaintiff for processing Valencia oranges during the 1951 season comparable to the contracts entered into between defendant Exchange Orange and alleged co-conspirators TreeSweet Products Company and E. A. Silzle Corporation; and, unless you find, from the preponderance of the evidence, that such refusal was a part of the conspiracy charged in the first cause of action and was done with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard the refusal as being of no consequence in this case, so far as the first cause of action is concerned."

made with the purpose and effect "of eliminating competitors, you will disregard such agreement or arrangement as being of no consequence in the case." Thus, in effect, the act "X" was lawful, unless you find it was done in unlawful conspiracy. These instructions were confusing. In view of all instructions given, and the nature of the case, we cannot hold the failure to give them, just as requested by defendants and appellants, constituted prejudicial error.

[fol. 3988] (5) Was it error to give the court's own instruction E (alleged error 2(y))[34] because of the court's ruling excluding so-called "after-acquired" information with respect to appellees' alleged watering of juice?

This again can better be decided under a discussion of errors charged with respect to the introduction of evidence.

(6) Was it error to fail to instruct the jury as to necessity of *"specific intent"* to eliminate a competitor in the first cause of action, and to exclude appellee as a competitor in the second cause of action (alleged errors 3(m), 3(n))? Appellants rely on *United States* v. *Griffith*, *supra*, and *Times-Picayune* v. *United States*, 1953, 345 U.S. 594, in support of both of their proposed instructions (nos. 8, 18).

> "It is, however, not always necessary to find a specific intent to restrain trade or build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. . . . Specific intent in the [fol. 3989] sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act. The classical statement is that of Mr. Justice Holmes speaking for the Court in *Swift & Co.* v. *United States*, 196 U.S. 375, 396:

[34] "The refusal of EOP, if such you find, to give a contract to plaintiff similar to the Silzle and TreeSweet Contracts must be judged on the basis of the evidence and instructions in this case and upon such knowledge and information as EOP and its officers, agents and employees had at the time of such refusal, if any, and not upon the basis of facts or information thereafter discovered or ascertained by EOP."

> 'Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.'
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> "Hence the existence of power 'to exclude competition when it is desired to do so' is itself a violation of [Sherman Act] § 2, provided it is coupled with the purpose or intent to exercise that power." *United States* v. *Griffith*, *supra* at 105-7.

Thus we find it not necessary to find a specific intent to restrain trade or eliminate a competitor or to create a monopoly. It is necessary to find that the restraint of trade or monopoly results as a consequence of the critical act, and that such act was done with the specific intent of accomplishing that act, when the actor acts from such a position that the natural result or necessary effect accomplishes the proscribed act. The actual result need not be the object of the specific intent.

We therefore rule that there was no error in refusing the appellants' proposed instructions 8 and 18 (alleged errors 3(m) and 3(n)). *Cf. Times-Picayune* v. *United States*, *supra* at 614, where the Court said:

> "The . . . contracts must be tested under the Sherman Act's general prohibition on unreasonable restraints of trade. For purposes of § 1 '[a] restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to ac-
> [fol. 3990] complish a forbidden restraint, or because it falls within the class of restraints that are illegal

per se.' United States v. *Columbia Steel Co.*, 334 U.S. 495, 522 (1948).

* * * * *

"[I]t '[is] unreasonable *per se* to foreclose competitors from any substantial market.'" *Id.* at 608.

Mr. Justice Clarke in *Times-Picayune* then goes on:

"Since the requisite intent is inferred whenever unlawful effects are found, *United States* v. *Griffith*, 334 U.S. 100, 105, 108 (1948); *United States* v. *Patten*, 226 U.S. 525, 543 (1913), and the [tying cases] rule of *International Salt* is out of the way, the contracts may yet be banned by § 1 if unreasonable restraint was either their object or effect." *Id.* at 614.

In conclusion, we find no reversible error in the instructions, other than error that need not be considered in view of our ruling as to damages, hereinafter to be discussed.

C. *Was there error in rulings on admission and rejection of evidence?*

1. *As to Liability*

Appellants urge that much evidence offered by them was wrongfully excluded by the trial court. They charge that this evidence went not only to the measure of damages, but to causation and liability. Motions for a directed verdict and for judgment *non obstante veredicto* were made, not only upon the grounds that plaintiffs had failed to prove (a) any conduct outside the agricultural cooperatives' exemptions; (b) any combination or conspiracy to restrain trade, or (c) any monopoly control or capacity or intent, but also upon the grounds (d) that plaintiffs had failed to prove injuries proximately resulting from any act of defendants, or (e) the amount of any damages claimed to have resulted to plaintiffs.

When Winckler asked in his second conversation with Finley for a contract similar to the TreeSweet and Silzle [fol. 3991] contracts, he was told he could not have the same type of contract. "I told him I . . . was having plenty of trouble . . . with those we did have contracts with wanting

more fruit, rather than less fruit, so I just couldn't give him a contract and cut off our old customers."

Appellants sought to introduce evidence "heard from others in the industry" that Winckler & Smith's juice was regularly watered and adulterated, and was of poor and inferior quality, and that such facts were in defendants' corporate "mind" when it refused to deal with Winckler & Smith in 1951, and this excused its "refusal" to so deal. This, of course, was, if admissible, material not only on the issue of liability, but also on the nature and extent of damages that proximately resulted from any liability found.

The difficulty with appellants' position with respect to admissibility on the question of liability was that specific information as to such "watering" had not reached the appellants at the time of their "refusal" in 1951. They had suspected that such facts existed; there had been rumors thereof, but no substantiation amounting to proof. We take it if a person charged with making a decision (which may or may not be a violation of law, dependent upon the intent and purpose and effect which accompanies it) is willing to rest such decision on surmise, suspicion, conjecture, and intuition, he has that right, but so acts at his peril. He may be called upon to justify it. Subsequently discovered facts cannot be introduced to fortify the strength of the facts upon which such previous surmise, conjecture and suspicion was based, but subsequently discovered facts could be utilized as a defense to the amount of damages claimed to have proximately flowed as a result of defendants' actions, whether such facts were known or unknown at the time the decision was made.

Appellants offered to prove "a statement by a former sales manager of Winckler & Smith Company, who, when asked whether Winckler was watering his product, this fellow said, 'I don't know, because I was instructed never to go into the plant.'" If we assume that this alleged statement goes *beyond* the expressed lack of factual knowledge it discloses on its face, and if it does purport to express a fact, it was not offered to establish the truth of the facts it purportedly contained, but the condition or state of Finley's mind when he talked to Winckler.

[fol. 3992] Appellants' offer of proof went farther than to show a condition of mind. It was that Finley would testify

that Charles Sisk, when asked if Winckler & Smith watered their products, said to Finley:

> "I couldn't prove it in court, but I am sure they do. Winckler, though, ordered me strictly never to go out in the plant, and I was never allowed in the plant while I was sales manager."

Again this expressed an unprovable opinion[35] in a third person that watering of the orange juice took place. But it was offered, not to prove watering, but that such a statement had been made to Finley—a statement that might affect his state of mind. In refusing the offer, the court ruled not that it was inadmissible to prove the state of mind, but was inadmissible as hearsay. The court stated:

> "Objection sustained as to conversation with Charles Sisk, the former sales manager. *If you want to bring Sisk in, we will cross that bridge at that time, as to what he can testify to.*" (Emphasis added.)

Part of the offer made was to show that at the price Winckler & Smith sold certain Arizona grapefruit juice, it could not make a profit. From this Finley concluded that water and sugar must have been added. As the trial court pointed out, another conclusion of equal validity would be that the sales were made by Winckler & Smith at a price which lost it money. Many factors, such as amount of stock on hand, finances of the company selling, or a dozen other factors might have brought about a sale at a losing price—and none of such reasons would be the basis for a conclusion that the juice was watered.

The trial judge concluded that the offer did "nothing but add and inject into the case other issues," and sustained

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[35] Part of the offer of proof was not only that certain persons had the opinion the Winckler & Smith juice was watered, but that "there is no analytical method known by which it can be determined whether water, sugar, or acid have been added to natural juice in order to compare that with the finished product. It is only possible to determine whether adulterants of that sort have been used by comparing an analysis made before [adulteration] and an analysis made after." Appellees, apparently surprised at this offer of proof, did not dispute its accuracy, but its admissibility.

[fol. 3993] the objection. Additionally, the offer was refused because the same witness, Finley, had testified the reason for his refusal to sell to Winckler was that he was having trouble with his existing contracts, because of a shortage of fruit. Or, as the trial court stated it, "because of the capacity that was involved." Of course, if Finley had more than one reason for refusing to deal with Winckler, he had the right to detail it, or them, to the jury. That he rested on but one explanation under cross-examination by plaintiff-appellee is no reason he could not have enlarged his reasons on direct examination. This presents a serious question as to whether error was not committed by the trial court. However, the court gave a further reason why he would not admit such evidence. The court ruled as follows:

> "I have already sustained the objection to similar matters on the further ground it is an issue that was never called to the attention of the court, was not listed as an issue that you intended to produce at this trial, was raised for the first time during the trial, and my previous comments on objections will be incorporated here at this point."

An examination of the pre-trial proceedings contained in the transcript before us indicates the court's statement as to issues raised was correct. We are inclined to think the ruling made was within his general judicial discretion as to the method of trial of the case, at least on the issue of liability, particularly in view of what the court did permit counsel for appellants to introduce into evidence.

Counsel for appellants presented evidence mentioned in his offer of proof which had not been ruled out by the trial judge. Finley, to show his state of mind in 1951, testified (a) to his unsatisfactory experience with Winckler in 1947 (when Finley had helped Winckler with scarce cartons, only to have Winckler's promises unfulfilled, with a subsequent recovery to Sunkist of eleven cents on the dollar; (b) to his unsatisfactory experience with Winckler & Smith in 1947 on the purchase of hot concentrates—"high yeast and bacteria count—poor pasteurization"; (c) his dissatisfaction with the Citromats (orange squeezing

machines) used by Winckler & Smith prior to 1951. The following question was then asked of Mr. Finley, still on direct examination, and he gave the following answer:

> [fol. 3994] "Q. Mr. Finley, at any time in 1951, assuming that you had had a surplus of fruit available for processing, would you have been willing to enter into any kind of a processing agreement with the Winckler-Smith Company?
>
> "A. I would never have entered into a processing agreement with the Winckler-Smith Company."

No additional offer of proof, nor any attempt to introduce evidence was made by appellants. We can find no ruling of the trial court on the issue of liability that constitutes error so prejudicial as to constitute reversible error.

2. *As to Damages*

This brings us to the matter of Exhibits I-1 to I-4, identified by witness Opal Smith (a laboratory technician employed by Winckler & Smith, as Opal Comstock, in 1949 until 1952, inclusive) as "Daily Laboratory Statistics" maintained by Winckler & Smith at their Anaheim plant, delivered to Mr. Winckler's desk.

As an example of her testimony, this witness testified that on one day the acid test in the raw juice was 1.54%; while in the canned product it was 1.27% acid. This change in acidity, said the witness, was accomplished by the addition of water.

Appellees took the position that the information disclosed by these records was not known to Sunkist when its Mr. Finley refused to contract with Winckler; that the fact of adulteration thus could not have entered into the refusal to contract, and was therefore immaterial. This position was taken by appellees, despite the testimony of the surmise or conjecture or conclusion of Sunkist's officer that the Winckler product was watered. If this evidence were offered solely for the purpose of explaining Sunkist's refusal, or adding a second reason for the refusal, it is conceivable that the records offered, at the then state of the record, would not be material, *i.e.*, were what counsel for appellees described as "after the fact evidence," a phrase

adopted by the trial judge. For that reason, we are not prepared to rule that the exclusion was error, if the limited purpose of offering the evidence was to show Finley's state of mind.

But such evidence was offered additionally for two separate purposes—to impeach the plaintiff Winckler as to his [fol. 3995] knowledge as to whether or not his products were adulterated (as well as prove the fact of adulteration), and secondly, it was offered on the question of damages—to show the Winckler & Smith product was an inferior and not a "Grade A" product, as Winckler had testified.

And, of course, if admissible for any purpose, the documents should have been admitted, *Petroleum Carrier Corp. v. Snyder*, 5 Cir. 1947, 161 F.2d 323; *Estate of Clark*, 1949, 93 Cal.App.2d 110, 116, 208 P.2d 737, with necessary precautionary instructions requested and given to the jury.

The trial judge originally saw the admissibility of such evidence on the issue of damages. But he saw difficulties in any effort which defendants-appellants might make to show (a) complaints by dissatisfied users that the product was watered; (b) loss of sales due to adulteration.

Counsel for appellants stoutly maintained he could produce such testimony, and stated: "getting back to the causation question . . . whether his product was good or bad has a bearing on why he went out of business."

Counsel for appellants urged that in view of Mr. Winckler's previous testimony that "Fancy" and "Fancy California" were the equivalent of Department of Agriculture "Grade A Fancy," this evidence was admissible, for Mr. Winckler had testified that under the government definitions of orange juice, a citrus product that is sold as orange juice contains no ingredient other than the juice extracted from fresh fruit; and that sweetened orange juice contains no ingredient other than the juice with dry sugar added.

Counsel for appellants further offered to prove that Winckler & Smith added tap water to the juice, rather than "merely" condensate. Winckler had denied he had done this, and agreed that "introducing tap water" was not permissible.

Counsel for appellants further offered to prove that the records offered "were regularly shown to Mr. Winckler,

they bear his initials showing he has seen them. By one witness I will show they discussed this practice of adding water to these products."

The trial judge then discussed the admissibility of these records at some length. He commented on the lack of ref- [fol. 3996] erence to the exhibits at the pre-trial; the "obvious purpose of this evidence is to bootleg into the record after-knowledge which the defendants did not have"; the possibility of using the records for impeachment, and if so, what his duty would be in that regard;[36] and further stated:

> "[T]his matter of taking an exhibit that might be admissible for one small purpose and tossing it in a case where it can have the effect of being used for a different purpose presents a problem. It presents a problem to the Court in its right to control the admissibility of evidence in a case.
>
> • • • • •
>
> "An offer that you made injects issues in this case where this case could go on forever."

The court then sustained the appellees' objections. On its admissibility on the question of damages, very little was said.[37]

We think the evidence was clearly admissible on the issue of damages, particularly in view of the specific terms of the offer with respect to causation, and specifically, dissatisfied users with resultant loss of sales. Such evidence was material, and we must assume the appellants were

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[36] "[B]ut if it does go into evidence as impeachment, the jury will certainly be told, and told in no uncertain terms what it will not be considered for, and when I get through telling them what it is not being considered for, I am afraid that the exhibit will not be as effective as the defendants think it might be."

[37] "As to the question of damages, that they would go to the question of damages, or causation, alleged inferior product, we are not trying a Food and Drug case.

"As far as we know, maybe people liked orange juice with water in it as well or better than orange juice without water in it assuming that you could prove that tap water was put in it."

able to produce it, had they been allowed to do so. We find the exclusion of such evidence was error. While it remains a close question as to whether this error is not prejudicial to the issue of liability, we believe that its exclusion might come within the trial court's discretion as to the control of evidence as to collateral issues. We therefore do not hold it was prejudicial error on the issue of liability. On the other hand, we find it clearly was prejudicial on the issue of damages.

[fol. 3997] The same conclusion applies to the proffer of proof by appellants of testimony by the witness William Rodgers, former plant superintendent of Winckler & Smith, that that witness had observed that single strength orange juice had been stretched by the addition of water and other additives to the extent of approximately twenty per cent—and that Mr. Winckler knew of this addition, and was satisfied to let it continue.

Appellants likewise claim error in restrictions placed upon them by the court's rulings preventing them from exploring Winckler & Smith's earlier business history—prior to 1951—or its alleged under-capitalization and inefficient operations; the court's position that losses reported for income tax purposes did not necessarily mean actual business losses; the court's refusal to admit Winckler's letters in 1951 explaining his inability to deliver juice due to other reasons, and the court's rulings respecting witness Hodge's mythical 12,000 tons theory of loss, and the appellants' attack thereon.

Appellants point out, as most important rulings against them, the following:

(1) Appellants sought to show that after the Chapter X reorganization, Mr. Winckler and other stockholders had withdrawn some $250,000 from the company in a two and one-half year period by way of salary, bonuses, debt forgiveness, and rentals. Appellees' objection was that this line of proof was "wholly irrelevant and immaterial . . . and not tending to prove or disprove any of the issues of this lawsuit." The objection was sustained, with the comment that appellants could prove the condition of the company in 1951. Later, the trial court relaxed this ruling somewhat to permit interrogation as to salary, allowances

and bonuses paid Mr. Winckler in 1949, 1950 and 1951, but not in other years; and he still excluded Exhibit BI which summarized the figures in the three years mentioned.

(2) While admitting evidence of the ultimate fact that Mr. Winckler had been forgiven a $38,000.00 indebtedness owing the corporation, the court excluded any breakdown of that figure. It was sought to show by this breakdown that substantial amounts of corporate funds were expended to enable Winckler to buy out one of the company's stockholders; and that the corporation, through its Chapter X [fol. 3998] receiver objected to the former's claim in this regard. The objection to this evidence was not clearly expressed, but seems to have been irrelevancy and "that the representation could not be supported by this witness [Mr. Lynch, appellants' accountant]." The objection, whatever it might have been, was sustained.

(3) Appellants were not permitted to show that in 1949 and 1950—the two years claimed by plaintiff to have been profitable ones—Winckler & Smith filed income tax returns showing a net loss, rather than a profit, in each of those years. The objection to this testimony stated no grounds —it was merely "I object to any inquiry along that line." That "objection" was sustained. Later appellees' counsel spoke of it being out of order, in the middle of the trial, to require plaintiff to produce further records, *i.e.*, the tax return for 1949; and the "objection" was again sustained on the ground the request came too late, and it would be going into extraneous issues. However, copies of state or federal returns for 1949, 1950 and 1951, with supporting schedules, had long since been identified by Mr. Winckler. And when those copies were offered in evidence they were excluded, the objection then being irrelevancy. Furthermore, when the court's attention was called to the fact that the 1949 return had been requested in appellants' pre-trial discovery long before the trial, he declined to change his ruling.

(4) It was appellants' theory that in calculating the loss or gain from the mythical 12,000 tons, as well as to arrive at the true cost of fruit under a TreeSweet type arrangement, it was necessary to take into consideration the re-

turns from oil and peel which, under such an arrangement, would have belonged to EOP. Accordingly, they prepared computations which took that factor into account and which showed that the cost of the fruit would be considerably more than Mr. Hodge's calculated figure and that the result, *vis-a-vis* processing of the 12,000 tons, would have been an additional loss. They also sought to have their accountant witness testify that this factor was omitted in Hodge's computations. The effort proved fruitless. The trial judge, largely on his own motion and for the reason that he thought appellants' theory to be illogical excluded the proffered evidence, both oral and documentary, on this subject. At first the trial judge indicated that he would [fol. 3999] exclude it only as direct rebuttal of or comparison with Plaintiffs' Exhibit 69-A in which the results of Hodge's theory were incorporated. Ultimately, however, he excluded the evidence entirely.

(5) A number of letters issued by Winckler & Smith were offered as containing statements, *i.e.*, admissions, showing that in 1951 its inability to furnish orange juice was due to the short California supply of fruit, heavy local bookings by Winckler & Smith, or excessive Florida inventory which had driven prices down. No objection was made as to foundation or authenticity; but it was objected that the person signing the letters had testified earlier. The objection was sustained.

Without going into precise details as to which portions of this evidence to which objections were sustained should have been admitted, we can say that we believe appellants were denied a fair opportunity to present their defense on the issue of damages to the jury. For example, income tax returns are frequently admissible, even though capable of being explained away, *Roche* v. *Commissioner*, 5 Cir. 1933, 63 F.2d 623; *United States* v. *Farrell*, D.Conn. 1929, 35 F.2d 38, and the business experience and operations and profits of previous years are not always, or necessarily, inadmissible.

The obligation is on a plaintiff in a Sherman Act case to prove damages recoverable in an action at law. *Locker* v. *American Tobacco Co.*, 2 Cir. 1914, 218 Fed. 447.

It cannot be said that the erroneous exclusion of evidence directly bearing on damages would not have affected the verdict. The error is therefore presumed to be prejudicial. "[A]n erroneous ruling which relates to the substantial rights of the party is ground for reversal unless it *affirmatively* appears from the whole record it was not prejudicial." *McCandless* v. *United States*, 1936, 298 U.S. 342, 347-8.

While a great deal of leeway is granted a jury in assessing damage once the fact of injury has been established, the damages alleged must be established as a direct and proximate result of defendant's violation of the Sherman Act with reasonable certainty. *Story Parchment Co.* v. *Patterson, etc. Paper Co.*, 1931, 282 U.S. 555, 562; *Flintkote Company* v. *Lysfjord*, 9 Cir. 1957, 246 F.2d 368; *Wolfe* v. *National Lead Co.*, 9 Cir. 1955, 225 F.2d 427, 431.

[fol. 4000] Plaintiffs-appellees introduced by means of the expert testimony of Mr. Hodge evidence of alleged loss of profits. This loss was based upon several presumptions:

First: That 12,000 tons of Valencia oranges were available to appellees;

Second: That the amount of juice taken therefrom would have produced a certain amount of canned juice, which would have been sold at a certain price, *i.e.*, the same price Sunkist charged TreeSweet *before* discount and allowances;

Third: That processing and other costs to Winckler in 1951 would be the same in 1951 as they were in 1949.

The evidence was that Winckler & Smith usually had received less for its orange juice than the price Sunkist usually received. There was evidence the equipment used by Winckler & Smith was not as efficient and modern as that of other canners. The demand for its juices was surely not as heavy as the demand for Sunkist brands or TreeSweet juice. The number of its single strength juice customers was known to have declined substantially in 1950 over 1949.

But beyond all the foregoing, if such difficulties as to proof of damages were overlooked, a further assumption would be required, that the lack of dealing by Sunkist with

Winckler & Smith was a proximate cause of the loss of Winckler & Smith's plant and business.

We need not go so far as to class this case with *Wolfe* v. *National Lead Co., supra,* where there was no proof of damage, and therefore dismiss the case. There this Court noted that the plaintiffs below

> "ask the court to disregard the apparent probative effect of their net profit figures [of their entire business] . . . and to consider only that portion of their business relating to titanium pigments, in this, they seek to have the court isolate the titanium pigment portion of their business and consider it separate and apart from their other operations. In this way, they attempt to establish the fact that they received a higher return on the titanium pigment . . . in 1949 than they were able to secure in 1947 and 1948." *Id.* at 430.

[fol. 4001] Here, if we substitute "Valencia oranges suitable for single strength juice" for "titanium pigments," the language is apt.

The record shows that in 1950, the year previous to the one here involved, the oranges sold to Winckler & Smith by Sunkist amounted to but 1.54% of the total used by Winckler & Smith. From 1948 on, Sunkist had never supplied more than 18%. The balance had been secured from other suppliers, principally Morgan Ward. In 1950, the number of oranges sold by Sunkist to Winckler & Smith was reduced to a mere trickle—1.54%. This was not claimed to be a proximate cause of the loss of the plant. Yet when Sunkist "refused" to sell 1.54% of the total to Winckler & Smith, and other producers refused to sell a larger percentage, appellees contend that *the sole* proximate cause of the damage suffered, including the loss of the plant, was the appellants' so-called "refusal."

At the time the plaintiffs below requested oranges from Sunkist the encumbrance on the Winckler & Smith property was in default. Thus the loss of the plant, on the evidence in the record before us, becomes collateral, remote and conjectural. *Savings Bk. of So. Cal.* v. *Asbury,* 1897, 117 Cal. 36, 48 Pac. 1081; *Hartman* v. *Rogers,* 1886,

69 Cal. 643, 11 Pac. 581; *De Liere* v. *Goldberg Bowen & Co.*, 1916, 30 Cal. App. 612, 159 Pac. 197. Whether it will remain so on a new trial of the issue of damages, we do not here pass upon.

Appellees' proof as to loss of the plant rested on the testimony of Robert Hodge. He just testified that from 1946 to 1949, the company apparently lost $224,000 plus. The net worth of the company was $30,000 on July 31, 1949. From February 1, 1949 to June 31, 1950, the company increased its net worth to $137,000. Operating from February 1, 1950 to January 31, 1951, there was an operating profit of $40,000. From February 1, 1951 to July 31, 1951, there was a loss of $152,000.

On April 16, 1951, the Winckler & Smith Company exercised its option to repurchase the plant which it had previously lost. The company issued 26,535 shares of its preferred stock, paid $17,325 in cash, assumed $50,499.04 on the mortgage, and listed its fixed assets at $721,000 plus, making a capital surplus of $343,000 plus. Exhibit 65 showed that for the year ending January 31, 1952, $156,000 [fol. 4002] in sales were from Florida processed products, and $528,735.91 from California operations, with a loss of $184,523.20 due to "less sales in 1952" and "continuing overhead."

Mr. Hodge, the expert witness, was a Certified Public Accountant. He was not familiar with the accounting of any juice processor other than Winckler & Smith. But he was allowed to testify that if 12,000 tons of fruit had been made available to Winckler & Smith by anyone on the same terms as was made available to TreeSweet, then *based on the 1949 and 1950 operations of Winckler & Smith*, it would have had a profit of $10,000 in the year ending January 31, 1952. This hypothetical question excluded any reference to conditions in the industry generally in any year, or even to operations of Winckler & Smith in 1951. In explaining his answer, the witness stated he *excluded* Winckler & Smith's processing costs for 1950, but used only 1949 costs. He used general administrative costs of 1949. He then deducted, not selling costs *per ton*, but "Winckler & Smith's actual selling cost *in the year 1952*, as shown in my report, of $87,652.40." (Emphasis added.)

Computed on the same basis, if 15,000 tons had been sold by Sunkist to Winckler & Smith, the profit would have increased from $10,231.45 to $54,026.45.

Without going into the credibility of such testimony, or the restrictions placed upon his cross-examination by the court's rulings on evidence, or any particular matters he testified to (as for example, the matter of deferred charges which though actually paid in one year were placed for bookkeeping reasons in another), we fail to find in the hypothetical statement of facts upon which the opinion of this expert was based that fair statement of all the facts in the case which is required as a basis of any hypothetical question. *Fort Worth & Denver Railway Company* v. *Janski*, 5 Cir. 1955, 223 F.2d 704; *Dairymen's Milk Co.* v. *McCormick Co.*, 3 Cir. 1940, 114 F.2d 736.

We are completely satisfied that the question of appellees' damages, as presented to the jury, rested upon surmise, conjecture, and guess work, and that the amount found as damages was not logically or legally inferrible from the facts in evidence before the jury. The expert opinion was a guess based on conditions contrary to fact. It was, in reply to the hypothetical question, too specula- [fol. 4003] tive to be admissible. *Baush Mach. Tool Co.* v. *Aluminum Co. of America*, 2 Cir. 1935, 79 F.2d 217, 227; *Carroll* v. *Magnolia Petroleum Company*, 5 Cir. 1955, 223 F.2d 657.

We are satisfied that the jury's determination of liability must be affirmed, and its determination of the amount of damages reversed.

D. *Was there error in affixing attorneys' fees of $195,000?*

While it is the duty of this Court "to protect against vicarious generosity in the matter of attorneys' fees" (*Twentieth Century-Fox F. Corp.* v. *Brookside Th. Corp.*, 8 Cir. 1952, 194 F.2d 846, 859), we cannot say as a matter of law that in a case like this, tried at great length below; argued twice on this appeal; and now to be reversed partially so that a new trial must be had below on the issue of damages, that before counsel for appellees obtain satisfac-

tion of judgment for their client that $195,000 as attorneys' fees is too large a sum, or a figure that would shock the conscience. We do not know what amount will be recovered by appellees on a second partial trial below. When that is determined, finally, the sum heretofore awarded as attorneys' fees may be too large, or conceivably, too small. We cannot prognosticate, nor guess. We do not reach that issue. It can be raised below by either side, and if necessary, on subsequent appeal. We will not now disturb it, but assume that on remand the correct amount will be in issue below.

The judgment heretofore rendered on the jury's verdict is affirmed on the issue of liability, and reversed and remanded on the issue of the amount of damages.

(Endorsed) Opinion Filed Sept. 30, 1960. As amended by order of May 5, 1961.

Frank H. Schmid, Clerk.

[fol. 4004]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15242

SUNKIST GROWERS, INC. A corporation, and THE EXCHANGE ORANGE PRODUCTS COMPANY, a corporation, Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO. a corporation, and RONALD WALKER, as trustee of WINCKLER & SMITH CITRUS PRODUCTS CO., Appellees.

JUDGMENT—Filed and entered September 30, 1960

Appeal from the United States District Court for the Southern District of California, Central Division

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause rendered on the jury's verdict be, and hereby is affirmed, on the issue of liability, and be, and hereby is reversed and remanded on the issue of the amount of damages, with each party to bear its own costs on appeal, except that the costs of the reporter's transcript and printing of the transcript of record on appeal are to be equally borne by the parties.

[fol. 4005] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15,242

SUNKIST GROWERS, INC., a Corporation, and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation, Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation, and RONALD WALKER, Trustee, Appellees.

ORDER MODIFYING OPINION AND DENYING PETITIONS FOR REHEARING—May 5, 1961

Before: Stephens, Barnes and Merrill, Circuit Judges

Upon petitions for rehearing by both appellants and appellees, we modify the opinion heretofore filed as follows:

I. The balance of the first full sentence after the word "of", page 24, line 4,* of slip opinion, is stricken, and inserted in its place is the following:

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* Now page 3975, line 7, first paragraph.

". . . (2) the alleged illegal sole trader decision not to sell, made *when such refusal would, as a natural consequence,* illegally restrain trade or commerce, and implemented by other illegal means beyond the bare refusal, or (3) a similar unilateral decision not to sell, except at a fixed price, made from a monopoly position, *and resulting, as a natural consequence, in the elimination of a competitor.*"

II. On page 50, line 18* from top of slip opinion, the language "and a sale on account thereof already set." is deleted.

The petitions for rehearing are severally denied. The suggestion for a hearing en banc is rejected.

Albert Lee Stephens, Stanley N. Barnes, Charles M. Merrill, United States Circuit Judges.

[fol. 4006] Clerk's Certificate to foregoing transcript (omitted in printing).

* Now page 4002, 4th line from bottom of page.

[fol. 4007] [File endorsement omitted]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15242

Before: Stephens, Barnes and Merrill, Circuit Judges.

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation, Petitioners and respondents,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER, Trustee, Respondents and petitioners.

MINUTE ENTRY OF ORDER ON PETITIONS FOR REHEARING—May 5, 1961

On consideration of the petitions, of (1) appellees, filed November 30, 1960, for a rehearing en banc, and of (2) appellants, filed December 1, 1960, for rehearing of above cause, filed within time allowed therefor by rule of court and valid extensions thereof, and pursuant to the order this day filed,

It Is Ordered that said petitions for rehearing be, and each of them hereby is denied; and the suggestion for a rehearing en banc is rejected.

Further Ordered that the opinion of this court heretofore rendered and filed on September 30, 1960 be amended pursuant to the order filed this date.

[fol 4008]

SUPREME COURT OF THE UNITED STATES

No. 241, October Term, 1961

SUNKIST GROWERS, INC., et al., Petitioners,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., et al.

ORDER ALLOWING CERTIORARI—October 9, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted limited to Question 1 presented by the petition which reads as follows:

"1. Where a group of citrus fruit growers form a cooperative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically wholly owned and governed by those growers, and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act (7 U.S.C.A., sec. 291)—is an unlawful conspiracy, combination or agreement established under Sections 1 and 2 of the Sherman Act upon proof only that these growers, through the agency of these three cooperatives, agreed among only themselves with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof processed and marketed by them?"

The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.